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IN THE
Supreme Court of the United States

October Term, 1964

Nos. 26 and 30

WHITNEY NATIONAL BANK IN JEFFERSON PARISH,
Petitioner,

v.

BANK OF NEW ORLEANS AND TRUST COMPANY, BANK
OF LOUISIANA IN NEW ORLEANS, GUARANTY BANK
AND TRUST COMPANY, LAFAYETTE, LOUISIANA; AND
STATE BANK COMMISSIONER OF THE STATE OF LOUI-
SIANA, *Respondents.*

JAMES J. SAXON, COMPTROLLER OF THE CURRENCY,
Petitioner,

v.

BANK OF NEW ORLEANS AND TRUST COMPANY, ET AL.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF FOR RESPONDENT BANKS

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BRIEF FOR RESPONDENT BANKS

This brief is filed on behalf of respondents, Bank
of New Orleans and Trust Company, Bank of Louisi-
ana in New Orleans and Guaranty Bank and Trust

Company of Lafayette, Louisiana, in response to the briefs filed in Nos. 26 and 30 on behalf of petitioners, the Comptroller of the Currency and Whitney National Bank in Jefferson Parish.

QUESTIONS PRESENTED

Respondents submit that the fundamental questions here to be decided have not been fairly or accurately presented to the Court by petitioners' briefs. Consequently, in accordance with the provisions of Rule 40 of the Supreme Court Rules, respondents restate the basic questions raised by these cases as follows:

1. Whether the Court of Appeals correctly held that Whitney National Bank of New Orleans—which is the largest bank by far in Louisiana and one of the largest in the entire South and which is, *by stipulation of all parties hereto, admittedly absolutely prohibited by Section 36c of the National Bank Act from opening any banking offices in Jefferson Parish, Louisiana*—is likewise precluded from *purposefully evading and nullifying* Section 36c by the mere device of creating its own *synthetic holding company*, through which it might funnel its *own funds* to open and operate banking offices at the same prohibited location.

2. Whether the Court of Appeals correctly held that the Comptroller of the Currency has no authority arbitrarily and capriciously to sponsor and attempt to license an intentional evasion of the National Bank Act, which he is charged to administer and uphold, solely because he personally thinks the end desirable and because he thinks the artificial corporate maneuvering involved to be impervious to attack.

¹ See Solicitor General's brief, pgs. 3, 4; petitioner Whitney's brief, p. 4.

3. Whether the District Court correctly ruled that passage of the Louisiana State Bank Holding Company Act, Act 275 of the 1962 Legislature, was within the power reserved to the States under Title 12 U.S.C. § 1846, the Federal Bank Holding Company Act; and, that Section 3(5) of the said Louisiana statute constitutionally prohibited petitioner Whitney National Bank in Jefferson Parish, *a wholly owned subsidiary of a Louisiana-incorporated bank holding company*, from opening for business.

4. Whether the Court of Appeals and the District Court correctly held that respondent banks, faced with proposed invasion of property rights and serious injury and damage from the proposed unlawful issuance by the Comptroller of a Certificate of Authority to petitioner Whitney-Jefferson, had standing to sue the Comptroller in this suit to test the legality of his proposed action under the National Bank Act (Title 12 U.S.C. §§ 27, 36c).

RESPONDENTS' COUNTER-STATEMENT OF THE CASE

Introduction

It will be a disastrous day indeed for the American banking industry, for the dual banking system historically preserved by the banking laws of the United States, and for respondent banks in the case at bar if this Court should ever accept at face value many of the alleged factual statements contained in petitioners' briefs; or if the Court should adopt, as the law of this nation, the principal legal arguments advanced therein by petitioners. Petitioners' briefs have attempted to create an atmosphere wherein this Court might somehow be led to believe that the Federal Bank Holding Company Act was passed by Congress to promote, fos-

ter and advance monopolistic bank holding company operations and to furnish bankers, bent on evading and circumventing the branching prohibitions of Section 36(c) of the National Bank Act, with a ready-made vehicle or device for so doing. As demonstrated later in this brief, the exact opposite is true. The Federal Bank Holding Company Act is a *penal statute* (12 U.S.C. § 1847), designed to *regulate and control* the operations of bank holding companies; and it was passed by Congress in such form that *it expressly reserved to the States their right to continue to prohibit, within their own borders, holding company attempts to evade and circumvent the prohibitions of branching statutes through mere corporate forms or maneuvers* (12 U.S.C. §§ 1842(d), 1846). The Chairman of the House Banking and Currency Committee described the purpose of the Federal Bank Holding Company Act as follows, when (as floor manager) he presented the Bill to the House (Cong. Record, 84th Cong., 1st Sess., p. 8021):

“The holding company was organized for the purpose of circumventing the banking law. The banking law in the 1920's generally did not permit any branches. There were no branches of national banks before 1927. Through the bank holding company device they circumvented the branch banking laws and accomplished something the branch banking laws had attempted to prevent . . . We are now trying to rectify that condition.”

Petitioners' briefs have also attempted to create the impression that “bank holding company devices” have been “frequently established” by metropolitan banks in Louisiana and elsewhere, and had thus already made a mockery of Section 36(c) of the National Bank Act

before this case arose. Again, this is *not* true. The record herein shows, for example, that Whitney's synthetic holding company proposal was the *only bank holding company of any kind* known to be in existence or even proposed in Louisiana (R. 357). That State, until now, has been wholly free of these so-called "twentieth century banking operations," as they are described by petitioner Whitney in its brief.

Moreover, while petitioners would have this Court believe that the sole purpose and effect of the Whitney holding company device would be to let Whitney harmlessly follow its customers into the New Orleans suburbs, the *actual* purpose and effect is quite differently described by Governor Robertson of the Federal Reserve Board and the Louisiana State Bank Commissioner in the Record before this Court. In the words of Governor Robertson (R. 109, 110):

"The establishment of additional banks and branches always contributes, in some measure, to the convenience of the banking public, and also, in many cases, to the vigor of banking competition. *In this case, however, banking offices affiliated with the largest financial institution in the area would be competing with small local banks, including a bank that opened for business only two months ago in the same shopping center in which it is proposed to locate one of the offices of Whitney Jefferson. The effect of the entry of Whitney Jefferson at this time could be significantly detrimental to this new bank and to another small bank with which Whitney Jefferson would directly compete.*" (Italics supplied).

And, in the vernacular of the complaint filed herein by the Bank Commissioner of Louisiana (R. 355-357):

"... the issuance by defendant of any certificate authorizing Whitney National Bank of New

Orleans, through the device of the Whitney Holding Corporation, unlawfully to establish banking offices in Jefferson Parish, Louisiana, with funds taken directly from the Whitney National Bank of New Orleans, *would cause chaos in the entire banking industry throughout the State of Louisiana, and would, contrary to the public policy of Louisiana expressed in Act 275 of 1962 and underlying L.R.S. 6:54, eliminate all effective protections historically fostered by the laws of the United States and the State of Louisiana for the growth of independent unit banks and to insure effective competition among all banking institutions. . . .*

"More specifically, with reference to Jefferson Parish, Louisiana, the granting of a certificate to intervening defendant herein would bring to bear upon all of the State banks located therein a new destructive, unlawful competition from the combined capital resources, lending power and management of the Whitney National Bank of New Orleans, and would place in jeopardy the capital investments in said banks.

"By law, the State chartered banks located in Jefferson Parish are prohibited from opening and operating branch banks in Orleans Parish, Louisiana, in competition with Whitney National Bank of New Orleans, and each is prohibited by law from creating, establishing and operating with its own capital resources, a holding company system controlling bank offices in Orleans Parish or elsewhere in the State of Louisiana.

"The State chartered banks located in Orleans Parish, Louisiana are relatively small competitors of the Whitney National Bank of New Orleans. Many of the depositors and borrowers of each of these banks either reside in or have offices located in Jefferson Parish, Louisiana, but nevertheless maintain substantial deposits or loan ac-

counts at the banking offices of such banks. Each of these banks is prohibited by law from expanding into Jefferson Parish by means of the establishment of branch facilities or by the device of creating a holding company through which it may simply siphon its capital funds into banking offices in Jefferson Parish or in other locations in Louisiana. *If the intervening defendant were licensed to open its facilities in Jefferson Parish, Louisiana, in contravention of these same statutory prohibitions, said defendant and Whitney National Bank of New Orleans would immediately be able to divest and appropriate to themselves substantial portions of the banking business and profits now enjoyed by the said Orleans Parish State banks from sources in Jefferson Parish, and would cause these State banks to suffer severe, irreparable damage and loss. . . .*" (Italics supplied).

Petitioners apparently were not satisfied to restrict their briefs to oblique factual statements and to upside down contentions with reference to the substantive law of this case. The brief filed on behalf of the Comptroller of the Currency, for example, goes even further and seeks to apply the same type of reasoning to the jurisdictional and procedural elements of this case. In the Court of Appeals, of course, the Comptroller of the Currency specifically instructed the Department of Justice "not to press the lack of standing argument, as he desired a ruling on the merits," and the attorney representing him there so advised the Court of Appeals (see Court of Appeals decision, R. 465). In fact, Comptroller Saxon himself appeared before the House Banking and Currency Committee in May, 1963, while this case was awaiting argument in the Court of Appeals, and as part of his testimony during that Committee's review of the Fed-

eral and State Banking Laws including the question of whether the right of State banks to sue the Comptroller in cases of this kind was being denied, unqualifiedly advised the Committee as follows at page 447 of the hearing record:

"Previous to my becoming Comptroller it had been the practice of the Department of Justice attorneys representing this office to assert the defense of lack of standing to sue. This practice was followed in preparing the papers filed in suits which were commenced against the office after I had assumed office. *I did not have any personal knowledge that this defense, which was one of several contained in the pleadings, was being asserted on my behalf. It has always been, and still is, my personal feeling that any action of mine should be open to review in a proper court of competent jurisdiction by a bank or individual who feels that a legal error was committed by our office. . . .*

"In the *Whitney* litigation, the defense of lack of standing was contained in the printed briefs. However, I requested the Department of Justice to inform the Court of Appeals that it was my personal wish that the case be decided on its merits. The Department of Justice representing me so advised the court at the argument last Friday.

"I regret any possible confusion which may have ensued in the minds of some because of my lack of direct information as to the technical defenses contained in the pleadings in law suits involving the office. . . ." (*Italics supplied*).

But now, here in this Court, the Comptroller has dredged up a vast array of specious "standing arguments," and in the process has spent approximately

20 pages of his brief attempting to support same without the benefit of any substantial legal authority. Respondents can only surmise that the Comptroller has suddenly lost his appetite for any further decisions on the merits in this case, and has thus reverted to the defense of "confusion" to which he himself referred in his testimony before the Congress.

We shall, of course, return to this matter of "standing" later in this brief. For the present, however, we submit that the correct rule was firmly established in *Wayne Oakland Bank v. Gidney, Comptroller of the Currency*, CCA 6, 1958, 252 F.2d 537, cert. denied, 358 U.S. 838, and *Wisconsin Bankers Association v. Federal Home Loan Bank Board*, 190 F. Supp. 90, 94 (U.S.D.C., D.C., 1960, affd. 294 F.2d 714, cert. denied, 368 U.S. 938). The rule was stated in the *Wayne* case at page 544, as follows:

"As to the standing of the Wayne Oakland Bank to maintain its suit, it was faced with invasion of property rights, and injury from a competition that was prohibited by the federal statutes subjecting national banks to the same rules of law as cover the state banks. . . . Whether the rights of a party are infringed by unlawful action of an individual or by the exertion of unauthorized federal administrative power, it is entitled to have such controversy adjudicated."

In the light of this brief introduction, we shall now set forth an accurate counter-statement of the facts of this case (*drawn almost exclusively from exhibits and testimony filed by petitioners themselves before the District Court*).

THE FACTS

The Whitney National Bank of New Orleans is the largest bank by far in the State of Louisiana (Comp. Ex. 5, R. 99). It is one of the largest financial institutions in the entire southern portion of the United States (Comp. Ex. 5, R. 99; 275). For approximately 80 years, Whitney has operated its banking offices and facilities wholly within the City of New Orleans, Parish of Orleans, Louisiana (the City and Parish having the same boundaries). Through these operations, *admittedly and concededly still properly and constitutionally restricted by a long-standing combination of Federal and Louisiana statutory law to the limits of Orleans Parish*, Whitney has grown to a position of banking dominance where it possesses (R. 275)—²

approximately \$500,000,000.—in resources

approximately \$ 13,835,000.—in undivided profits

approximately \$ 27,200,000.—in its surplus account

approximately 39% —of the total deposits in *all* banks
in Orleans Parish

approximately 44% —of all deposits of individuals,
partnerships and corporations
in the Parish.

² In this connection, it is interesting to note by way of comparison, that the unlawful banking proposal, approved by the Comptroller of the Currency but enjoined by this Court in *U.S. v. Philadelphia National Bank*, 374 U.S. 321 (1963), was deemed violative of the Clayton Act, because, *after the merger there involved, the resulting bank would control "at least 30% of the commercial banking business in the . . . Philadelphia metropolitan area."* This Court stated, at page 364: "Without attempting to specify the smallest market share which would still be considered to threaten undue concentration, *we are clear that 30% presents that threat.*" (Italics supplied). Here, Whitney controls approximately 40% or more.

Contrary to the competitive picture sought to be conveyed by petitioners in their briefs, Whitney National Bank today, as in the past, continues to maintain this position of dominance. It controls and possesses more deposit and loan business than the second and third largest New Orleans banks combined (R. 275). It also possesses at its offices in New Orleans deposits of individuals, partnerships and corporations emanating from the East bank of the Mississippi River in Jefferson Parish (i.e., *beyond the limits of Orleans Parish*) in an aggregate amount exceeding 30% of such deposits enjoyed by *all banks*, state and national, having their head offices in the same area of Jefferson Parish (R. 276). In the record before this Court, Governor Robertson of the Federal Reserve Board formally describes the concentration of banking resources possessed by Whitney National Bank as (R. 111)—

“ . . . a centralization of banking power of major proportions in individual hands, to a degree that, to my knowledge, is without parallel in the American banking system.”

As indicated above, both petitioners (the Comptroller and Whitney) consistently and openly conceded, before both the District Court and the Court of Appeals, that Whitney National Bank of New Orleans remains today, as it has been in the past, *constitutionally and lawfully prohibited by a combination of Federal and Louisiana law* from opening banking offices beyond the limits of Orleans Parish. This stipulation is found again, at page 3 of the Solicitor General's brief now before this Court, as follows:

“However, State law (La. R.S. 6:54) prohibits banks from opening branch offices in parishes other than their home parish and these geographi-

cal limitations are made applicable to national banks by the Banking Act of 1933 (12 U.S.C. 36).”

Substantially, the same stipulation is found in petitioner Whitney’s brief, at page 4, including footnote 3, where it is stated:

“As a national bank, Whitney-New Orleans is prevented from establishing branches outside Orleans Parish by 12 U.S.C. § 36(e), which provides that national banks may establish branches only within the geographic limits imposed by state law on state banks. . . . State banks in New Orleans with capital of more than \$100,000 are prohibited by 6 La. Rev. Stat. §§ 54 and 328 from establishing branches outside Orleans Parish.”

Nevertheless, Whitney-New Orleans was still exceedingly desirous of opening branch facilities in Jefferson Parish, and elsewhere in Louisiana, beyond the limits of New Orleans (R. 276; 64). It carefully studied all of the means whereby it might possibly avoid, circumvent and evade the prohibitions of the aforesaid combination of federal and state law (R. 276). It specifically considered and firmly rejected the possibility of an “affiliate arrangement,” such as was involved in *Camden Trust Company v. Gidney, Comptroller of the Currency*, 112 U.S. App. D.C. 197, 301 F.2d 521, cert. denied 369 U.S. 886 (1962), a case resolved by a sharply divided opinion of the same Court

³ In *United States v. Philadelphia National Bank*, *supra*, this Court recognized the validity and substance of these prohibitions, by stating, at page 325: “. . . but branching, which is controlled largely by state law—and prohibited altogether by some States—enables a bank to extend itself only to state lines and often not that far.”

of Appeals which later declared the Whitney holding company device to be in circumvention and violation of Section 36c of the National Bank Act.⁴ With regard to Whitney's rejection of a Camden-type "*affiliate arrangement*," the President of Whitney-New Orleans, in testimony presented as an exhibit in this case by the Comptroller, put it this way (Comp. Ex. 4, R. 74):

"If branch banking were permitted in Jefferson Parish, I wouldn't be here because it would be much simpler to have it by way of a branch. . . . But that is not possible. We see no signs of it coming about by legislative action . . . and our problem has been—we have been unwilling to go with an *affiliate* which we couldn't hold onto necessarily.

"It (an *affiliate*) doesn't become a part of our organization; it is just sort of hanging loosely. You have these conflicts of interest and it is awkward.

⁴ The so-called "*affiliate arrangement*," referred to at page 4 of the Solicitor General's brief, at page 5 of the Whitney brief in connection with the National Bank of Commerce, and as described in the *Camden Trust Company* case, *supra*, arises when some of the individual stockholders of one bank go out and raise new, fresh capital, which they themselves then individually invest to purchase stock in a second bank. That arrangement, wholly unlike the Whitney holding company device, *does not* involve the creation of a *synthetic* holding company by the first bank; it *does not* involve common, continuing management and control of the two banks by one holding corporation; it *does not* involve the investment of the original bank's funds in the stock of the second bank; and the so-called "*affiliate status*" abruptly ends whenever one or more of the substantial stockholders involved sells or disposes of stock in one or both banks. Also, in an "*affiliate*" situation, the two banks often compete with each other for the same business, which would never be true in the Whitney proposal.

"The thing that makes this (the holding company approach) interesting to us is the ability to approach the branch phase of it. . . ." (Italics supplied).⁵

As indicated by that testimony, Whitney-New Orleans finally decided to try a "holding company approach," admittedly as a means of circumventing the Federal and State statutory prohibitions. In this particular connection, the President of Whitney-New Orleans also was shown to have testified in an exhibit offered in this case by the Comptroller (Comp. Ex. 4, R. 64, 65):

"Under present laws in our state, the Whitney is not permitted to establish branches outside the Parish of Orleans.

"There is a rapidly growing industrial area in adjoining Jefferson Parish up river from Orleans,

"The management of the Whitney National Bank has been studying and weighing alternative methods of entering Jefferson Parish . . . and to participate in the further growth of that area. . . .

⁵ It is interesting to note that while petitioner Whitney, at pages 32-34 of its brief, arduously maneuvers to try to side step and explain away the very candid testimony given by the President of Whitney-New Orleans in this matter, the Solicitor General actually continues to adopt and rely on it, at page 4 of his brief. After explaining that Whitney had no interest in an "affiliate arrangement" and decided to adopt a holding company device to enter Jefferson Parish, the Solicitor General, *relying on Mr. Berry's testimony*, frankly states that this decision was made: "In order to assure a continuity of relationship between the new and the old bank, and to avoid any conflict of interest in transactions between the banks"

"The officers of the Whitney National Bank determined in 1960 that the holding company was the proper solution, provided we could put the ownership of the present Whitney National Bank of New Orleans stock into such a company *and, by the use of Whitney assets, establish a bank in Jefferson Parish, which would likewise be fully owned by the holding company.*" (Italics supplied).

A very surprising and unusual aspect of the case in the Courts below was the open, sworn admission by the Comptroller of the Currency that his office and top officials therein (*including the Comptroller himself*) had actually met with the President of Whitney-New Orleans for the purpose of furnishing *advance*, private advice and guidance from the very outset as to how the Federal and State branching prohibitions might be circumvented and evaded (R. 42, 43). The Comptroller, in a sworn affidavit, stated (R. 42, 43):

"... the Whitney National wished to explore with the Comptroller whatever ... means were available for ... expansion into this growing area. ... The formation of an affiliate bank was discussed and the formation of a holding company was also discussed. The bank management felt that a holding company which would own 100% of the stock of both the old bank and the new bank would be preferable to the formation of an affiliate of which the controlling stock would be held by the same persons who control Whitney-New Orleans, but which, in view of the wide stock distribution of Whitney-New Orleans, would invariably have a minority of stockholders who did not own stock in both banks. The existence of the minority stock interest in each bank, which did not hold corresponding shares in the other, was considered by the Whitney management to be an

undesirable situation because it could conceivably hamper the most efficient and effective day-to-day operation of the two banks. Since the same group would be managing both banks, it was thought that situations could arise in which it would be impossible for the interests of two different groups of minority stockholders to be fully protected. *For this reason, the Whitney management . . . elected to use a holding company for the purpose of establishing a . . . bank in Jefferson Parish.*

"At all times the applicable Louisiana statutes forbidding the establishment of branch offices across parish lines were fully considered. . . ."
(Italics supplied).

Having obtained this private, favorable, off-the-record nod from the Comptroller of the Currency before even proceeding with Whitney's plan to circumvent the Federal and State branching prohibitions, the President of Whitney-New Orleans was thus able to make the following bold assertions when he later appeared before the Federal Reserve Board (Comp. Ex. 4, R. 65, 66):

"The Comptroller of the Currency has concurred in a program which has the effect of putting the ownership of the present Whitney National Bank stock into the Whitney Holding Corporation, through this Crescent City National Bank that was mentioned, and to the establishment of the Whitney National Bank in Jefferson Parish with funds from the present Whitney National Bank, the stock of which would be also owned by the holding company. . . ."

"The Comptroller has already concurred in the acts required to consummate the first step and granted preliminary approval of an application

for charter for the Whitney National Bank in Jefferson Parish. . . .

"We understand that he has advised you that these charters will be issued if and when the Federal Reserve Board approves this application for a holding company, which will own the stock of the present Whitney National Bank of New Orleans and the stock of Whitney National Bank of Jefferson Parish."

This private advance approval by the Comptroller also caused the Whitney National Bank of New Orleans speedily to embark upon its plan for the circumvention of the statutes, and to set into motion a series of intricate corporate maneuvers, *the sole purpose* being to accomplish indirectly and by evasion that which was admittedly unlawful for it to accomplish directly, i.e., Whitney's expansion into Jefferson Parish (R. 278, 279). Although complicated in execution, these corporate maneuvers were simply designed to draw funds from the Whitney National Bank of New Orleans, with which to establish totally controlled banking offices and facilities in Jefferson Parish and later elsewhere in Louisiana:

First: With \$350,000. of its capital funds, Whitney National Bank of New Orleans created Whitney Holding Corporation, *a corporation organized under the laws of Louisiana.*

Second: Solely with the \$350,000. contributed by Whitney-New Orleans, Whitney Holding Corporation organized a so-called "*phantom bank*" named Crescent City National Bank, (Crescent), to which the Comptroller of the Currency agreed to issue a national bank charter, *knowing full well that Crescent would exist*

*in name only, and would never engage in the banking business.**

Third: Whitney New Orleans and Crescent, which latter entity never actually operated for an instant as a national bank (and Whitney Holding Corporation), entered into a consolidation or merger agreement, merging Whitney New Orleans into Crescent. The name of the merged bank was then immediately changed back to Whitney National Bank of New Orleans.

Fourth: Whitney National Bank of New Orleans shareholders surrendered their stock for cancellation, and accepted in exchange Whitney Holding Corporation shares, dissenting stockholders, if any, being eliminated by the purchase of their shares under provisions

* A Federal Officer's issuance of a national bank charter to a non-existent bank, knowing well it was never intended to be opened and operated as a national bank and that its sole purpose was to eliminate dissenting stockholders of Whitney National Bank of New Orleans who did not want to participate in the evasion of federal and state laws (there were 12,145 dissenting shares out of approximately 100,000 voting on the matter), was perhaps the second most bizarre aspect of the case below. This maneuver caused a member of the Federal Reserve Board to state (R. 110): "In order to eliminate minority stockholders of Whitney National Bank of New Orleans and thereby to insure that Whitney Holding Corporation will be able to elect all members of the bank's board of directors, the plan before the Board includes a so-called '*phantom bank*' merger, which makes it impossible for a [dissenting] stockholder to retain his stock interest therein. The purpose of centralizing control of the holding company and its banks in the hands of very few individuals—perhaps only one individual—is apparent from other features of the proposal."

of the National Banking Act.⁷ Thus, Whitney Holding Corporation thereupon owned 100% of the stock of Whitney National Bank of New Orleans, and the shareholders of Whitney National Bank of New Orleans owned 100% of the stock of Whitney Holding Corporation.

Fifth: Whitney National Bank of New Orleans then provided \$650,000 of its capital funds to Whitney Holding Corporation "with which Whitney Holding Corporation was to cause to be created the Whitney National Bank in Jefferson Parish, receiving all of its (the Jefferson Bank's) stock therefor".⁸

The President of Whitney-New Orleans candidly and succinctly summarized the end result of these corporate maneuvers for the Federal Reserve Board, in an exhibit offered in this action by the Comptroller as follows (Comp. Ex., 4 R. 68):

"The Whitney National Bank of New Orleans will continue in exactly the same form as it is now except for the withdrawal of \$650,000 in capital funds which will be put into the Jefferson Parish unit as capital for it."⁹

⁷ The Court should note that holders of 12,145 shares out of 100,000 actually voted against the entire device. In fact, dissenting stockholders of Whitney New Orleans even appeared before the Federal Reserve Board to protest federal recognition of the illegal circumvention of the statutes. (R. 83-88).

⁸ In order to enable the Court to obtain more quickly a complete analysis of these corporate maneuvers in their entirety, respondents respectfully direct the Court's attention to the charts which appear in the Record (pgs. 281-284).

⁹ It is again interesting to note that the Solicitor General, at page 6 of his brief, again adopts the exact substance of the words employed by the President of Whitney-New Orleans to de-

When the time arrived for Whitney-New Orleans to obtain support from its stockholders for these corporate proposals, its President, Mr. Berry, sent them a notice and, contrary to the oblique protestations contained in petitioners' briefs now before this Court, advised them quite bluntly in writing as follows (R. 31, 32):

"... It is important to bear in mind that under the plan all authorized shares of the Whitney Holding Corporation will be distributed to you, the stockholders of the Whitney National Bank, in exchange for your presently held stock. *You will then own the same proportionate interest as you now have in the Whitney National Bank in all the assets of the holding corporation, which obviously includes all of the assets of the present Whitney National Bank. Control of the Holding Corporation management will rest . . . with the holders of a majority of the stock. . . .*

"We are firmly convinced, after careful consideration of the alternatives, *that your common ownership of all of Whitney National Bank of New Orleans stock and all of the stock of a Whitney National Bank in Jefferson Parish by a holding company to be owned by you is the soundest method of pooling all of the deposits of our customers and of our capital funds for their use and for the development of this community. From the depositors' point of view, those in the smaller bank will be assured of the same management which directs the larger one without possibility of interruption. They will be assured of access to*

scribe the "end result" of these corporate manipulations. The Solicitor General states: "The *net result* would be to establish a holding company, owned by the original stockholders of Whitney-New Orleans, which would in turn own both Whitney-New Orleans and Whitney-Jefferson."

the large loan limits of the combined banks. They will have the security which arises out of the fact that the large and the small bank have identical ownership as well as management. . . .

“Under the *holding company* approach, the relationship is *completely owned by the stockholders of the holding company*, who will be *all the present stockholders of the Whitney National Bank and their successors*.

“By reason of the common ownership of the two banks in a holding company there can arise no conflict of interest between them as there can between *affiliated banks*.¹⁰ There will be no minority stockholders to be affected.

“From the customer point of view, there will be no conflict of interest arising out of the manner in which the customer sees fit to divide his business *between the commonly owned banks in the two parishes. He will have the full benefits of a relationship with the large bank and its officers.*

“Because of the *permanent relationship* between the large and the smaller bank, the smaller one can operate safely with a smaller capitalization. . . .

“Finally, this holding company group broadens banking possibilities for the future from the point of view of our shareholders. . . . It will give metropolitan New Orleans the soundest form of banking unit *which can accumulate and pool banking resources in this community where they can be used to greatest advantage in the further development of the entire area.*” (Italics supplied.)

¹⁰ The Court's attention is directed again to the repeated rejections by Whitney-New Orleans, on the ground of alleged “conflict of interest” possibilities, of an “*affiliate arrangement*”, such as the one involved in *Camden Trust Company v. Gidney*, *supra*.

After it was created by Whitney National Bank of New Orleans under the corporation laws of the State of Louisiana, Whitney Holding Corporation made application to the Federal Reserve Board *solely* for the purpose of gaining that Board's approval, under the provisions of 12 U.S.C. § 1842 (The Federal Bank Holding Company Act), of its proposed acquisition of all of the shares of the aforementioned "phantom", Crescent City, and Whitney National Bank in Jefferson Parish. In accordance with the requirements of 12 U.S.C. § 1842(b), the Board notified the Comptroller of the Currency of the application and sought his views (R. 286). Having personally assisted in the formulation of the plan and having already annointed it with his private blessing, the Comptroller, in three short paragraphs of a letter to the Board, promptly gave his unqualified written approval (R. 166, 167; 286). The Comptroller failed even to mention or comment upon the legality or illegality of the proposal under Section 36 of the National Bank Act (R. 166, 167).

In fact, the Comptroller apparently led the attorney for Whitney-New Orleans to feel it was appropriate for him orally to represent to the Federal Reserve Board that the Comptroller's only concern in the matter was that he wanted to be assured Whitney would be permitted to go ahead "with the meat of the program, which was moving into Jefferson Parish"; and that the Comptroller fully "approved the . . . bank in Jefferson Parish as a desirable banking feature." (R. 93, 94).

Petitioners' briefs seemingly might lead this Court to believe that respondents missed all sorts of oppor-

tunities to oppose the Whitney proposals at public hearings before the Comptroller and the Federal Reserve Board. The truth is more than just the opposite. *First of all, the Comptroller of the Currency, who was solely responsible for the licensing of the proposals under the National Bank Act, never held any hearings at all.* Under the procedures of his office, all actions taken were *ex parte* and private. *Secondly, under the provisions of the Federal Bank Holding Company Act (12 U.S.C. § 1842), when the Comptroller registers his approval of an acquisition proposal pending before the Board, that action obviates the necessity for the statutory public hearing otherwise required.* Thus, in the case at bar, the Comptroller's letter of approval caused the Board to dispense with the statutory public hearing in Louisiana. It did, however, conduct a conference proceeding at its headquarters in Washington, where it accepted "views and comments" on the application (R. 62). None of the respondents were personally served with any notice of this proceeding, the only official notice thereof apparently being published in the Federal Register.

However, when the Board did elect to accept a presentation of views on the Whitney application, dissenting stockholders of Whitney-New Orleans itself appeared and vehemently protested the illegality of the entire proposal under both Federal and State law (R. 75-90). One of these stockholders referred to Whitney's holding company device as a mere "*mythical corporation*" (R. 79), while the attorney for the remaining minority stockholders called it "merely a figment" (R. 86); an "evasion" (R. 87); a "scheme" (R. 87). The attorney for Whitney's own minority

stockholders concluded his presentation before the Board as follows (R. 88):

"... I don't think that this Board has ever approved such a legal maneuver and I don't think that it is within the realm, nor was it contemplated by the acts of Congress that this type of legal maneuver should be permitted and sanctioned by this Board to do what? To permit Whitney National Bank to do indirectly that which they cannot do directly. And I don't think that you gentlemen should lend yourselves to permit them to do indirectly that which the law directly prohibits them from doing."●

These contentions by Whitney's stockholders caused the Federal Reserve Board, on its own motion, to write a letter to the Comptroller of the Currency advising him that serious charges had been made that Whitney's proposals "were in violation or circumvention of existing law" (R. 423-425). The Board then stated in its letter to the Comptroller (R. 425):

"In view of the bearing that these matters might have on the Board's decision on Whitney Holding Corporation's application, the Board would appreciate any comments that you may have. . . ."

The Comptroller, however, refused to comment on any of these matters (R. 425, 426). Instead, he replied as follows (R. 426):

"Other comments with respect to the legality and merits of the holding company are matters on which a previous Comptroller of the Currency has expressed himself; *therefore, further enlargement on the subject is deemed undesirable.*" (Italics supplied).

But, the record is barren of any expressions to the Board by any Comptroller of the Currency, past or present, regarding the "legality and merits of the holding company" device here involved (see R. 166). The fatal effect of the Comptroller's strange refusal to supply such information or comments to the Board is patent when it is fully understood that the Board declines even to consider or rule on such matters itself, absent advice from the Comptroller (R. 168, 286, 287). *The Board took the position in this very case that all matters "relating largely to an alleged violation of provisions of the National Bank Act" are for the Comptroller, not the Board* (R. 168, 286, 287).

Thus, when the Board rendered a decision on May 3, 1962 approving the application of Whitney Holding Corporation to proceed to acquire the shares in Crescent and Whitney Jefferson, it did so without even referring to 12 U.S.C. § 36(c), 12 U.S.C. § 1846 or the Louisiana law prohibiting branching by national and state banks beyond parish lines, or the effect these statutes might have had upon its decision (R. 287). In fact, having received an unqualified green light from Comptroller Saxon, the Board candidly admitted it was authorizing Whitney-New Orleans, through a holding company device, to evade the prohibitions otherwise imposed upon it by the law (R. 99, 100). The Board accordingly ruled (R. 99, 100, 101):

"Under the law of Louisiana, a bank may not establish branches outside of the parish in which its head office is situated. . . . The boundaries of Orleans Parish are conterminous (sic) with the boundaries of the City of New Orleans, and consequently banks situated in New Orleans (including

national banks) may not establish branches beyond the city limits. . . .

"... In accordance with the requirement of section 3(b) of the Act, the Comptroller of the Currency was asked to submit his views and recommendations with respect to the pending application. In a letter dated October 11, 1961, Comptroller . . . recommended approval . . .

"The stated purpose of the proposed holding company system is to enable an organization centered about Whitney New Orleans to provide banking services not only through its existing 12 offices within the City of New Orleans but also through offices in the East Bank of Jefferson Parish. The holding company system will be under the direction of the present executive management of Whitney, New Orleans; in fact, for present purposes, the holding company itself is simply the means by which Whitney banking offices may be established and operated in East Bank. Consequently, the character of the management and the prospect of the Applicant (Whitney Holding) and its two proposed subsidiary banks may be evaluated largely on the basis of the financial history and condition, character of management, and prospects of Whitney New Orleans.

"The financial history of Whitney New Orleans has been satisfactory. The condition of that bank is sound and its management is regarded as satisfactory. Accordingly, it is believed that the management of Applicant and Whitney Jefferson will be satisfactory and the prospects of the holding company, which depend principally upon the prospects of Whitney New Orleans, are favorable." (Italics supplied).

This bald endorsement by the federal government under these circumstances of a device admittedly de-

signed flagrantly to circumvent and violate both Federal and State law was a bit too much for Governor Robertson of the Federal Reserve Board. In a dissenting opinion, he stated (Comp. Ex. 5, R. 109-111):

“Whitney National Bank of New Orleans is the largest banking institution of the City of New Orleans and the State of Louisiana. It controls in the neighborhood of 40% of the deposit and loan business of all New Orleans banks—more than the second and third largest banks combined. The proposal before the Board of Governors would place control of this bank in Whitney Holding Corporation and thereby would overcome the effect of the branch banking laws of Louisiana, which prevent Whitney from establishing any offices outside of . . . the City of New Orleans. In other words, by this means the Whitney banking organization would escape the legal limitations that now permit it to have offices only within the City of New Orleans.”

“In my judgment, one of the basic purposes of the Bank Holding Company Act—to prevent undue concentration of banking power in holding companies—would be unjustifiably defeated by approval of the creation of a holding company system to control the predominant bank of a major metropolitan area and additional banks within that area. . . .”

Governor Robertson then went on to conclude (R. 111):

“In brief, the plan before the Board seems designed to minimize the participation of stockholders, and even of directors, in the control and management of the holding company and its subsidiary banks. . . . Taken together, these features . . . reflect an arrangement by which power to direct

and control the holding company system, including its banks, could be concentrated in the hands of a single individual. . . . It should not receive this Board's stamp of approval.

"The proposal before the Board would provide a vehicle for enhancing the existing high degree of banking concentration in the area and would permit a centralization of banking power of major proportions in individual hands, to a degree that, to my knowledge, is without parallel in the American banking system. For these reasons, I conclude that the creation of the proposed holding company system would be contrary to the public interest, and therefore should be denied." (*Italics supplied*).

In the face of this decision by the Federal Reserve Board, the State Bank Commissioner of Louisiana immediately sought an opinion from the Attorney General of Louisiana as to whether Whitney's holding company device was lawful (R. 289): The Attorney General issued the following written opinion, in substance (R. 163, 164, 289):

"There is a general principle of law that corporate entities must be disregarded where they are made the implements for avoiding a clear legislative purpose. To allow the establishment of a bank holding company to avoid and circumvent the branch banking laws of our State is, in our opinion, prohibited, if not by the letter, by the spirit of our law. . . .

"It is the opinion of this office, therefore, that a bank holding company may not circumvent the branch bank laws of our State by the acquisition of a controlling interest in a subsidiary which is located in a parish other than the domicile of the parent company."

The Louisiana State Bank Commissioner thereupon sent a copy of this opinion by the Attorney General to the Federal Reserve Board (R. 165). He requested a rehearing (R. 165). Other of the respondents herein also petitioned for reconsideration (R. 167). *The Board refused to reconsider the matter, stating that the questions raised "relate largely to an alleged violation of provisions of the National Bank Act, which is administered by the Comptroller of the Currency"* (R. 168).

The Board's decision granting Whitney Holding Corporation's application was subject to judicial review, upon the filing of a petition in the Fifth Circuit Court of Appeals *within 60 days after May 3, 1962* (12 U.S.C. § 1848) (R. 288). Upon such review, the Court of Appeals would have jurisdiction under 12 U.S.C. 1848—

"to affirm, set aside, or modify the order of the Board and to require the Board to take such action with regard to the matter under review as the Court deems proper."

However, before any petition for review could be prepared and filed and before the action of the Federal Reserve Board could become final under 12 U.S.C. 1848 or under the Regulations of the Federal Reserve Board itself, Comptroller of the Currency Saxon, on May 18, 1962 (*just 15 days after the Federal Reserve Board acted*) announced that he had already considered and approved Whitney's program and had directed that same proceed to completion "on or after May 24, 1962" (*just 21 days after the Federal Reserve Board acted*) (R. 34). By June 20, 1962 (*also before the 60-day appeal period prescribed by 12 U.S.C. 1848 had expired*) Comptroller Saxon was further proclaiming that *absent the granting of an in-*

junction by the District Court in the case below, he would consider it his "duty . . . to issue a Certificate of Authority to Whitney Jefferson. . . ." (R. 47, 289).

Accordingly, the Complaint for Declaratory Judgment and Injunction herein was filed on June 9, 1962 (R. 6). The action was grounded on 12 U.S.C. §§ 27, 36, 1841 and 1846, and prayed for an injunction enjoining the Comptroller of the Currency from issuing a certificate under 12 U.S.C. § 27 licensing the commencement of Whitney's unlawful banking operations in Jefferson Parish, Louisiana. The Comptroller, upon being advised of the filing, voluntarily agreed to withhold issuance of his Certificate of Authority to Whitney-Jefferson until the Motion for Preliminary Injunction herein could be heard and determined (R. 289). Two of the respondents herein also thereupon timely filed in the Fifth Circuit a petition to review the ruling of the Federal Reserve Board which approved the holding company application under 12 U.S.C. § 1842 (b) (*Bank of New Orleans and Trust Company, et ano. v. Board of Governors of the Federal Reserve System*, No. 19, 788, CCA 5).¹¹

¹¹ On October 7, 1963, after receiving extensive briefs and hearing oral argument by all parties, including the Government and Whitney Holding Corporation, the Fifth Circuit entered the following Order:

"In view of the decision of the Court of Appeals of the District of Columbia in *Whitney Nat'l Bank in Jefferson Parish v. Bank of New Orleans and Trust Company*, Nos. 17,672 and 17,681, August 14, 1963, decision in the present case will be withheld pending determination in the District of Columbia case of the application for rehearing and any subsequent proceedings involving application for a writ of certiorari."

On December 11, 1963, the Fifth Circuit denied Whitney's motion to vacate that ruling.

It seems important at this point to digress for a moment to correct some glaring inaccuracies which unfortunately appear in petitioners' briefs before this Court. In his brief, the Solicitor General states, at page 10, that "By May 25, 1962 (i.e., *before this action was commenced*) Whitney-Jefferson was organized as a national bank under the terms of the National Bank Act . . .", and that Whitney-Jefferson was wholly ready "to commence the business of banking." In its brief, Whitney baldly states, at page 8, that on the date this action was commenced: "Whitney-Jefferson was prepared to open its doors for business. . . ." All of these statements are incorrect, as the sworn Record herein clearly shows. *First*, on May 25, 1962, Whitney-Jefferson was a mere "body corporate" under the terms of the National Bank Act (12 U.S.C. § 24). It could not become a "national bank" until the Comptroller issued a Certificate of Authority as provided in that Act (12 U.S.C. § 27). No such Certificate had been issued by June 9, 1962, when this action was commenced. And, of course, the very purpose of this action was to enjoin the Comptroller from issuing a Certificate which would license Whitney to commence the business of banking in Jefferson Parish, in violation and evasion of the National Bank Act itself.

Secondly, Whitney-Jefferson had *no* door to open for business in Jefferson Parish on June 9, 1962, the date this action was commenced; and indeed, it had *not yet* subscribed to and paid for capital stock of the Federal Reserve Bank of Atlanta, as alleged by the Solicitor General's brief (p. 10). On the contrary, *after this action was commenced* on June 9 and solely for the purpose of putting Whitney-Jefferson and the Comptroller in a position where they might urge that

some substantial "damage" would be sustained if a preliminary injunction should issue, Whitney-Jefferson frantically took the following steps (*as taken from the sworn affidavit of its own President*); (R. 390, 391).

1. "On June 15, 1962, Whitney Jefferson subscribed for three hundred sixty (360) shares of \$100.00 par value stock of the Federal Reserve Bank of Atlanta, Georgia, and paid the necessary portion of the subscription price as required by the Federal Reserve Act, namely \$18,000.00."

2. "During the period June 4-8, 1962, Whitney-Jefferson commenced negotiations for a *temporary site* for its banking operations with the owner of the premises 4407 Jefferson Highway. On June 13, 1962, Whitney-Jefferson instructed and authorized the real estate agent negotiating the lease on behalf of Whitney-Jefferson to enter into a formal lease agreement on its behalf, *which lease was executed and effective June 15, 1962.*"

3. "Whitney-Jefferson finally acquired its proposed permanent site, 4408 Jefferson Highway, on June 29, 1962." (*Italics supplied*).

The so-called "*temporary site*", rented by the \$500,000 Whitney organization on June 15, 1962 as aforesaid to give some credence to its contention before the Courts that it was ready to open for business, turned out to be as late as July 3, 1962, a rather dilapidated "Washateria" (R. 193-195). A photograph of the said "*temporary site*", taken on July 3, 1962, (*almost a month after this action was commenced*), appears in the Record at page 195, and as Appendix A to this brief. The so-called "*permanent site*", on July 3, 1962 was found to be "The Royal Tourist Court" (R. 193-200); and photographs of this facility are also in the Record and Appendix hereto.

As stated above, when this action was initially filed, the Comptroller agreed voluntarily to withhold the issuance of his Certificate until the Motion for Preliminary Injunction could be argued. Thereafter, and without any fault of respondents contributing thereto, petitioner Saxon suddenly refused to continue voluntarily to withhold same (R. 174, 175; 178-182). The parties accordingly appeared before the District Court, and after a hearing, Judge Hart granted a Temporary Restraining Order directing the Comptroller to withhold his Certificate until the Motion for Preliminary Injunction could be heard (R. 176-177).

The Motion for Preliminary Injunction came on to be heard on July 6, 1962 before Judge Holtzoff (R. 225-273). During these proceedings Judge Holtzoff stated it seemed clear "that what the Whitney National Bank was doing was trying to establish what in essence, though not in form, was a branch bank." (R. 257). The Court stated further "if this device is legal, then you might as well repeal Section 36(c)" (R. 260). The Court was also advised by counsel for petitioners that Louisiana was then considering remedial emergency legislation, which would become law "on Monday" (3 days hence) and which would clearly prevent a Louisiana bank holding company and its subsidiaries from opening for business a bank not yet open (R. 264). The Court replied that it was "not going to rush the matter in order to prevent an action on the part of Louisiana or any other state legislature" (R. 264). The Court thereupon granted a preliminary injunction (R. 272, 273).

As indicated, since late May, 1962, the State of Louisiana, never before confronted with the monopolistic plague of bank holding company operations, but now

confronted with a sudden, totally unexpected, arbitrary administrative approval of what was considered a brazen attempt by the largest bank in the State to circumvent and evade the prohibitions of both Federal and State branching statutes merely through the device of a holding company intermediary, had been considering, in its House and Senate, emergency legislation authorized to the States by the reservation contained in the Federal Bank Holding Company Act, 12 U.S.C. § 1846. This legislation Act 275 of 1962, was passed by the House on June 27, 1962 by a vote of 80 to 16 (R. 333, 334). It passed in the Senate on July 4, 1962, and was signed into law on July 10, 1962, *the same day on which the Preliminary Injunction herein was signed by the District Court* (R. 295, 296, 221). This Act, at Section 3(5) and as here pertinent, provided:

“It shall be unlawful . . . (5) for any bank holding company or subsidiary thereof to open for business any bank not now opened for business. . .”

As stated above, all parties thereupon moved for summary judgment. It was stipulated and agreed that “the issue of the alleged violation of Louisiana Act 275 of 1962 is to be treated in all respects as raised in the pleadings herein” (R. 384, 385). In other words, the parties agreed in writing that the Court should determine whether Act 275 of 1962 effectively precluded the issuance of a Certificate to Whitney-Jefferson, in addition to the question of whether the issuance of a Certificate was likewise precluded by the original Section 36(c) issues raised by the pleadings. Petitioners thereupon attacked Act 275 of 1962 as unconstitutional. The Louisiana State Bank Commissioner then moved to intervene (R. 346, 347). All

parties consented to his intervention (R. 385). The District Court thus granted his motion and added him as a plaintiff (R. 385, 386).

After extensive briefing and oral argument of the motions for summary judgment, the District Court (Judge McLaughlin) thereupon granted respondents' cross-motions (R. 435-438). The Court ruled, in substance, that (a) the Comptroller of the Currency had no discretion to issue a Certificate under 12 U.S.C. § 27 to license an operation prohibited by law; (b) Act 275 of 1962 was constitutional and authorized to Louisiana by 12 U.S.C. § 1846; and (c) Act 275 rendered unlawful Whitney's proposed operations in Jefferson Parish, and thus the Comptroller was to be permanently enjoined from chartering same under 12 U.S.C. § 27. Judge McLaughlin went on to state (R. 438):

"The Court having upheld the constitutionality of Louisiana Act 275 in its application to defendant making it unlawful for said defendant to open in Louisiana, the Court deems it unnecessary to address itself to the cogent arguments put forth by counsel on the question of the applicability of 12 U.S.C. 36(c) as to whether, by its terms, it proscribes in these circumstances, the setting up of the type of bank herein involved and secondly, if not proscribed by the terms of the statute, whether this Court ought to look behind the corporate form of the new bank to determine whether or not it is in violation of Section 36(c)." ¹²

¹² The District Court nevertheless made detailed Findings of Fact in support of its Judgment, and these clearly included all of the essential undisputed facts necessary to support a ruling on the Section 36(c) issues (R. 445-448). The Court's attention is directed particularly to Findings 7, 8 and 17 (R. 446, 448).

Petitioners both appealed (R. 452, 453). The Court of Appeals, consisting of Circuit Judges Miller, Washington and Danaher, affirmed the judgment of the District Court, holding, in substance, at 323 F.2d 290:

"Consequently, we pierce the corporate veil which shrouds this intricate transaction, and see Whitney-New Orleans attempting to establish a branch in Jefferson Parish in violation of 12 U.S.C. § 36(e). It is a bootstrap operation by which Whitney-New Orleans, using its own funds in corporate maneuvering, seeks to establish a branch in prohibited territory. . . .

"We think it clear that the opening of Whitney-Jefferson is prohibited by 12 U.S.C. § 36 and that consequently, the Comptroller was properly enjoined from issuing a Certificate of Authority for it to begin business. . . ."

Both the Comptroller and Whitney petitioned for rehearing *en banc*. These petitions were unanimously denied on October 17, 1963.¹³ The petitions for a writ of certiorari ensued.

These clearly establish the utter fallaciousness of the position taken by petitioner Whitney, at page 31, et seq. of its brief, to the effect that the District Court made no findings of fact upon which the Court of Appeals could later ground its opinion under Section 36e of the National Bank Act.

¹³ Two Judges abstained.

SUMMARY OF ARGUMENT

I

It is settled law that the Comptroller of the Currency has no discretion under the National Bank Act (12 U.S.C. 27) to issue a Certificate of Authority to license a banking operation prohibited by law, and if he attempts to do so, the Courts will enjoin him (*Wayne Oakland Bank v. Gidney*, 252 F. 2d 537, *cert. denied* 358 U.S. 838; *Commercial State Bank v. Gidney*, 174 F. Supp. 770, *affd.* 278 F. 2d 871; *Union Savings Bank v. Saxon*, D.C. App. No. 18,145, 1964). 12 U.S.C. 27 itself proscribes the issuance of a Certificate until it can be shown the banking corporation involved "is lawfully entitled to commence the business of banking"; and it provides that the same shall be withheld whenever it appears that the shareholders of the proposed banking facilities "have formed . . . for any other than the legitimate objects contemplated" by the National Bank Act.

In the case at bar, both petitioners *unequivocally concede* that Whitney National Bank of New Orleans is absolutely prohibited by the National Bank Act (12 U.S.C. 36e) from opening *any* branches or offices outside of Orleans Parish. Petitioners also concede that the *sole purpose* of the synthetic holding company device established by Whitney New Orleans and the proposed Jefferson Parish banking operation was and is to *defeat and evade* the said prohibitions of 12 U.S.C. 36e. In cases of this nature, this Court and others in the Federal system have historically ruled that when corporate forms or devices are created and used solely for the purpose of evading or frustrating a statutory prohibition, such devices must be disregarded in order

to preserve and uphold the law (*Northern Securities Company v. United States*, 193 U.S. 197; *Metropolitan Holding Co. v. Snyder*, 79 F. 2d 263; *Corker v. Soper*, 53 F. 2d 190). That rule has been applied particularly whenever a holding company device has been organized to defeat the National Bank Act.

Consequently, for all of the reasons discussed in Point I of this brief, the decision of the Court of Appeals herein was eminently correct and fully supported by the Record, *which consists almost entirely of exhibits submitted and testimony given by petitioners herein*. That decision was based on the "realities" of this case, and of course, under the law, mere differences in "form" do not salvage corporate devices established to evade the law. Furthermore, the Whitney plan not only evades Section 36e of the National Bank Act. It also violates the sense of 12 U.S.C. 1845, which was passed by Congress to prevent bank funds from being siphoned off to finance holding company operations.

The fundamental and fatal weakness which runs through petitioners' briefs is their blind refusal to recognize, as the Court of Appeals did, the essential differences which exist from the very outset between (a) a *bona fide* bank holding company established by investors to invest its own capital funds in the stocks of different banks, and (b) the Whitney-type synthetic holding company, *established by a bank itself, solely and admittedly as a "device" and for the purpose of using that bank's funds alone to open banking offices at a place prohibited by Sections 36(c),(f) of the National Bank Act*. When this distinction is clearly understood, it becomes evident that the decision of the Court of

Appeals must be affirmed if the branching prohibitions of the National Bank Act are to be sustained at all.

The Court of Appeals properly rendered summary judgment. All parties cross-moved for that relief and all formally stipulated before the District Court that there was no genuine issue regarding any of the material facts involved. Thus, petitioner Whitney, never contended until this case reached the Supreme Court that it was "inappropriate" for the Court of Appeals to have decided this case on summary judgment, and this Court therefore is without jurisdiction to consider such a belated contention (*Bloeth v. New York*, 82 S. Ct. 661, 662 (1962)). In any event, the sole ground asserted in support of this contention is that the testimony of Mr. Berry, then and still the President of Whitney New Orleans and Whitney Holding, *filed herein by petitioner Comptroller*, should not be taken at face value and petitioner Whitney should thus be given a chance to rebut this testimony by its own organizer. No such bizarre contention should be entertained by this Court (*Atlas v. Eastern Airlines, Inc.*, 311 F. 2d 156, 162, *cert. denied*, 373 U.S. 904); and it is of course, interesting to note that the Solicitor General does not seriously join in this contention.

II

Petitioners would apparently have this Court rule that Congress has historically sought to foster *Whitney-type* holding company devices, and has thus consistently voted to leave national banks, desirous of evading the prohibitions of the National Bank Act, free to adopt such devices, specifically as a means for defeating the law. The Congressional policy has been exactly *opposite*.

As early as 1911, one of the large New York national banks, almost exactly like Whitney-New Orleans in this case, created a holding company device through which it might evade and defeat the branching prohibitions and other restrictions of the National Bank Act. The President of the United States requested an opinion as to the legality of this maneuver. The Solicitor General and Attorney General of the United States, *relying on decisions of this Court*, rendered a written opinion, holding, as the Court of Appeals did in this case, that the "device" was "in usurpation of Federal authority and in violation of Federal law." In 1932, the Chairman of the Senate Banking and Currency Committee, during the Senate debate on the Bank Act of 1933, inserted this Opinion in the Record, stating that it correctly stated the rules of law which should be applied to strike down corporate devices created to evade and defeat the National Bank Act.

All of the Congressional proceedings supporting the bank Act of 1933 and the Bank Holding Company Act of 1956 were to the same effect. It is thus clear that the Court of Appeals' decision herein actually supports and gives great force and effect to a policy Congress has espoused for approximately 35 years.

III

The licensing of Whitney's proposed operation in Jefferson Parish was correctly enjoined not only because it constituted a clear-cut attempt to evade and defeat the prohibitions of section 36c of the National Bank Act, but also because it is directly and expressly prohibited by Section 3(5) of the Louisiana Bank Holding Company Act, as authorized by the "Reservation of States Rights" contained in the Federal Bank Hold-

ing Company Act, 12 U.S.C. 1846 (*Braeburn Securities Corp. v. Smith*, 15 Ill. 2d 55, 153 N.E. 2d 806 (1958), *appeal dismissed by this Court for want of a substantial federal question*, 359 U.S. 311).

By so ruling in *Braeburn*, this Court simply reaffirmed that national banks, which are instrumentalities of the Federal Government and subject to the paramount authority of the United States, are nevertheless subject to State laws and prohibitions *whenever Congress so provides* (*Mercantile Nat. Bank of Dallas v. Langdeau*, 371 U.S. 555, 559 (1963)).

Moreover, Congress itself went as far as it possibly could in the Federal Bank Holding Company Act to make it clear that the States were to retain the right to prohibit or severely regulate, within their respective borders, bank holding companies and their operation or control of both national and state bank subsidiaries (18 U.S.C. 1841(c), (d); 1842(d); 1846). Thus, the District Court's decision herein is likewise absolutely correct, and we submit it too should be upheld by this Court.

Finally, there is no merit whatsoever to petitioner Whitney's claim that Louisiana Act 275 violates the Fourteenth Amendment (*Stone v. Mississippi*, 101 U.S. 814; *Douglas v. Kentucky*, 168 U.S. 488; *Ferguson v. Skrupa*, 372 U.S. 726 (1963)).

IV

The District Court and Court of Appeals both found, on the basis of the facts here involved, that respondent banks had standing to sue, and that they would suffer a legal wrong if the Comptroller were permitted to license an unlawful competition, prohibited by a com-

bination of both Federal and State law (*Wayne Oakland Bank v. Gidney*, 252 F. 2d 537, *cert. denied*, 358 U.S. 830; *Wisconsin Bankers Association v. Robertson*, 190 F. Supp. 90, 94, *affd.* 294 F. 2d 714, *cert. denied*, 368 U.S. 938, rehearing denied, 368 U.S. 979; *Commercial State Bank v. Gidney*, 174 F. Supp. 770, *affd.* 301 F. 2d 521). Any denial of such standing would clearly deprive respondents of their property and statutory rights without due process of law and would leave the Comptroller of the Currency in a position where his decisions, in violation of the very statute he administers, would be without remedy and beyond the scope of judicial review. This would be in violation of the rules established by this Court in *Frost v. Corporation Commission*, 278 U.S. 515 and *Stark v. Wickard*, 321 U.S. 288.

When the District Court found that respondent banks had standing to sue, there could no longer be any question regarding its jurisdiction or the right of respondent banks to judicial review under the Administrative Procedure Act, 5 U.S.C. §§ 1001, 1009, (*Stark v. Wickard*, *supra*, *Wisconsin Bankers Assn. v. Robertson*, *supra*). Finally, respondents have no adequate remedy at law to prevent or rectify the Comptroller's proposed unlawful action. The Comptroller admits that there is "no provision for an administrative hearing and no authorization for competitors to appear before the Comptroller" to contest his *ultra vires* actions—"his decisions are made *ex parte*." And, he concedes that Congress *has not provided, in the National Bank Act or in any other statute, for any other mode of judicial review of his decisions*. What an excellent opportunity for the creation and maintenance of a capricious autoeracy, without any due process of law, if this Court should rule, as the Comptroller contends,

that there should be no "forum where competitors could protect an alleged right to be free of *unauthorized competition*", whenever he proposes to license same!

The absolute importance of a decision by this Court affirming the Court of Appeals on the standing to sue and jurisdictional aspects of this case lies also in the fact that, once the Comptroller is permitted to issue his Certificate, *respondent banks would have no remedy whatsoever (Commercial State Bank v. Gidney, supra)*. If the right to maintain this suit were taken from respondents, the illegal operation would be licensed forthwith, vast irreparable damage would be done, the branching restrictions of the National Bank Act would no longer be sustainable, the prohibitions of the bank holding company statutes would be defeated, and equity, contrary to its most basic maxim, would have suffered a wrong to be without a remedy.

Finally, this suit in no respect represents a collateral attack on a decision of the Federal Reserve Board, made under a *different statute and in a case involving entirely different matters and parties*. Petitioners both concede that *separate approval actions of two federal agencies were necessary before the Whitney program could be put into effect*. The first, required by the National Bank Act standing alone, involved exclusively Whitney Jefferson's right to open and commence the business of banking (12 U.S.C. 21-27); and that entire process was under the sole jurisdiction of the Comptroller. The second, required by the separate Federal Bank Holding Company Act standing alone, involved exclusively the right of Whitney Holding Corporation to become a holding company and to acquire the stock in the two Whitney banks. That pro-

cedure was under the sole jurisdiction of the Federal Reserve Board.

Hence, these two *separate* administrative proceedings involved (1) completely different matters and objects, (2) different applicants and applications, and (3) entirely different and separate determinations—i.e., (a) the lawfulness of the licensing by the Comptroller of Whitney Jefferson's proposed banking operation, and (b) the legality of the proposed stock acquisitions by the holding company, same to be decided exclusively by the Board.

Congress therefore quite naturally prescribed *completely different and independent administrative proceedings* to be pursued by the parties, one under the National Bank Act (12 U.S.C. 21-27), the other under the Holding Company Act (12 U.S.C. 1842)—and judicial review of the Comptroller's decision in the former in no respect enjoins or modifies the Board's decision in the latter— and vice versa, under 12 U.S.C. 1848. In fact, the Comptroller himself has made it quite clear on the Record here (R. 310), *that unless he is enjoined in the instant action*, he intends immediately to license the opening of Whitney Jefferson, irrespective of the fact that judicial review of the Board's decision under 12 U.S.C. 1848 is wholly incomplete and still pending in the Fifth Circuit—and of course, respondents are powerless to obtain an injunction against the Comptroller or Whitney Jefferson in the Fifth Circuit, because neither are even Parties there.

ARGUMENT

I

The Court of Appeals Correctly Enjoined the Comptroller of the Currency From Licensing, Under 12 U.S.C. § 27, a Proposed Banking Operation Admittedly Conceived, Designed and Proposed Solely for the Purpose of Evading, Defeating and Violating the Prohibitions of the National Bank Act (12 U.S.C. § 36c)

It is settled law that the Comptroller of the Currency has no discretion under the National Bank Act (12 U.S.C. § 27) to issue a Certificate of Authority to license a banking operation prohibited by law, and if he attempts to do so, the Courts will enjoin him (*Wayne Oakland Bank v. Gidney*, 252 F. 2d 537 (CCA 6, 1958), cert. denied 358 U.S. 838; *Camden Trust Company v. Gidney*, 301 F. 2d 521, 522 (ftn. 4, 5, D.C. App. 1962), cert. denied 369 U.S. 886; *Commercial State Bank v. Gidney*, 174 F. Supp. 770, affd. 278 F. 2d 871 (D.C. App. 1961); *Union Savings Bank of Patchogue v. Saxon*, D.C. App. 1964, No. 18,145. Title 12 U.S.C. § 27 itself proscribes the issuance of a Certificate of Authority until it can be shown that the banking corporation involved "is lawfully entitled to commence . . . business"; and that section expressly provides for the withholding of a Certificate whenever it appears that the shareholders of the proposed banking facilities "*have formed same for any other than the legitimate objects contemplated*" by the National Bank Act.

In the case at bar, both petitioners *unequivocally concede* that Whitney National Bank of New Orleans is absolutely prohibited by the National Bank Act (12 U.S.C. § 36c) from opening *any* branches or banking offices or facilities outside of Orleans Parish, Louisiana. 12 U.S.C. § 36(f) actually defines the term "*branch*" to be all-inclusive, as follows:

“The term ‘branch’ as used in this section shall be held to include any branch bank, branch office, branch *agency, additional office, or any branch place of business* located in any State or Territory of the United States or in the District of Columbia at which deposits are received, or checks paid, or money lent.” (Italics supplied).

Petitioners also concede that the *sole purpose* of the synthetic holding company established by Whitney New Orleans and the proposed Jefferson Parish banking operation now before this Court was and is *to defeat and evade* the said branching prohibitions of Section 36(c) of the National Bank Act (Whitney brief, p. 4, 5; Comp. brief, p. 3, 4). These concessions, on their face, establish beyond peradventure that the proposed Jefferson Parish operation was intentionally created for “*other than the legitimate objects contemplated*” by the National Bank Act, and accordingly, the issuance of a Certificate is necessarily precluded by the language of 12 U.S.C. § 27 itself.

Furthermore, in cases of this nature, the Federal Courts, with this Court in the vanguard, have historically ruled that when corporate forms or devices, including a holding company, are created and used solely for the purpose of evading, circumventing or frustrating a statutory prohibition or to defeat public or legislative policy, such devices must be disregarded in order to preserve and uphold the law (*Northern Securities Company v. United States*, 193 U.S. 197; *United States v. Lehigh Valley R. Co.*, 220 U.S. 257; *United States v. Reading Company*, 253 U.S. 26; *Schenley Distillers Corp. v. United States*, 326 U.S. 432; *Metropolitan Holding Co. v. Snyder*, 79 F. 2d 263 (CCA 8, 1935); *Corker v. Soper*, 53 F. 2d 190 (CCA 5, 1931),

cert. denied 285 U.S. 540 (1932); *Alabama Power Company v. Federal Power Commission*, 94 F. 2d 601 (D.C. App.); *Francis O. Day, Inc. v. Shapiro*, 267 F. 2d 669 (D.C. App.); *Fitzpatrick v. Commonwealth Oil Co.*, 285 F. 2d 726, 730 (CCA 5); *Corn Products Refining Company v. Benson*, 232 F. 2d 554, 565 (CCA 2)). In *Fletcher Cyclopedia Corporations* (1963 Rev. Ed.), Vol. 1, Ch. 2, § 45, pp. 240, 241, the rule is stated as follows:

“Where the corporate form of organization is adopted or a corporate entity is asserted in an endeavor to evade a statute or to modify its intent, courts will disregard the corporation or its entity and look at the substance and reality of the matter.”

Indeed, since the early 1930's the Circuit Courts have consistently ruled, in cases involving the banking industry, that whenever officers, directors or shareholders of a national bank create a holding company or some other similar corporate device, specifically for the purpose of evading or defeating a provision of the National Bank Act, the holding company veil must be pierced or ignored in order to sustain the law (*Metropolitan Holding Co. v. Snyder*, *supra*; *Corker v. Soper*, *supra*, in which case certiorari was denied by this Court). In the *Metropolitan Holding Company* case, the Eighth Circuit ruled in 1935 at 79 F. 2d 263, 266, 267:

“... the courts will not countenance the interposition of a mere corporate shadow to conceal who are the actual and beneficial owners of bank shares. To permit individuals to circumvent ... this statute by simply organizing a corporation for the purpose of holding shares would set up a device against which the statute would ever afterwards be ineffective”

The decision in *First National Bank of Billings v. First Bank Stock Corporation*, 306 F. 2d 937 (CCA 9, 1963), relied on by petitioners herein, is not contrary to the basic rule adopted by the other circuits and applied by the District of Columbia Court of Appeals in the case at bar. In fact, in its decision in *Billings*, the Ninth Circuit specifically stated, at page 942:

"... We do not agree with appellees that the fact that the two banks are separate corporate organizations demonstrates conclusively that one is *not* the branch of the other. In the banking field, as elsewhere, courts have the power to 'pierce the corporate veil' when the realities require it."

Consequently, we submit that the decision of the Court of Appeals in the instant action was eminently correct, and that it must be affirmed by this Court if Section 36(c) of the National Bank Act is to survive the combined assaults of monopoly-minded bankers and Comptrollers of the Currency who are preoccupied with its administrative repeal rather than its enforcement.¹⁴

¹⁴ The Record shows that the Comptroller helped devise the plan enjoined by the Court of Appeals (R. 42, 43). It shows also that Comptroller Saxon, formerly an attorney for one of the largest national banks in the United States, has repeatedly announced his opposition to Section 36(c) and his desire to see it rescinded (R. 35, 36). Furthermore, the decision of this Court in *U.S. v. Philadelphia National Bank*, *supra*, shows that while the Attorney General, FDIC and the Federal Reserve Board unanimously rejected the merger, which this Court later found to be in violation of the antitrust laws, the Comptroller nevertheless approved it and sought to put it into operation. The very same procedure was followed by the Comptroller in *United States v. First National Bank and Trust Company of Lexington*, 84 S. Ct. 1033 (1964), in the face of unanimous opposition from the other three federal agencies involved.

Contrary to petitioners' contentions that the Court of Appeals decision was "unfounded," "myopic," "irrelevant," "unsupported by the record" and "improperly made," that Court carefully considered all of the exhibits and evidence in the record (*which, by the way, consisted almost exclusively of petitioners' own testimony and exhibits*) and concluded (R. 470):

"If Whitney-Jefferson, in its *organization, management and operation*, would be to all intents and purposes a branch of Whitney-New Orleans forbidden by 12 U.S.C. 36(c), the authority of the District Court to enjoin him (the Comptroller) from issuing a Certificate of Authority is quite clear."

The Court of Appeals then went on laboriously to find, *from the written statements and testimony of the President of Whitney New Orleans himself* (R. 470, 471):

"There was actually no pretense about the matter: Whitney of New Orleans frankly proposed to evade the statutes by establishing through the holding company arrangement an office in East Jefferson Parish which it would manage and control. Its president said on October 27, 1961, in his communication to Whitney-New Orleans stockholders which explained in detail the plan of reorganization:

"The *basic purpose* of the program is to allow the Whitney organization in New Orleans to commence a Holding Company operation controlling a bank in East Jefferson Parish to protect Whitney's competitive position in that area

"On October 28, 1961, he wrote to his stockholders:

"... From the depositors [sic] point of view, those in the smaller bank will be assured of the

same management which directs the larger one without possibility of interruption. They will be assured of access to the large loan limits of the combined banks. They will have the security which arises out of the fact that the large and the small bank have identical ownership as well as management.

'From the customer point of view there will be no conflict of interest arising out of the manner in which the customer sees fit to divide his business between the commonly owned banks in the two parishes. *He will have the full benefits of a relationship with the large bank and its officers.*

'Because of the *permanent relationship* between the large and the smaller bank, the smaller one can operate safely with a smaller capitalization.'

"This is a very good description of a branch banking operation The *nature* of the arrangement, and *not the label applied to it*, determines the character of the relationship between two banking institutions. In 12 U.S.C. § 36(f) Congress gave a broad meaning to the word 'branch'

The Court of Appeals, referring to still other statements and actions taken by Whitney New Orleans and its President, stated further in its decision, at R. 475:

"The facts already recited sufficiently show, we think, that Whitney-New Orleans intends to do business through Whitney-Jefferson in the same way as if the institutions were one. The President of Whitney-New Orleans frankly made this quite clear. We recite some of his statements: *On June 28, 1961, in submitting to the Comptroller applications to organize Crescent City and Whitney-Jefferson and to consolidate Crescent*

City with the original Whitney-New Orleans, Whitney's President said:

"These applications form part of an overall plan for the operation in the Parish of Orleans and in the Parish of Jefferson of the Whitney organization in holding company form." (Italics supplied).¹⁵

The Court of Appeals also found from the Record that the "Board of Governors of the Federal Reserve System . . . was under no illusion as to the true nature of the transaction" (R. 472), and the Court stated '(R. 476):

"... the Board of Governors . . . said 'The holding company itself is simply *the means* by which Whitney banking offices may be established and operated in East Jefferson Parish.' "

The Court therefore justly and correctly ruled, on the basis of authorities such as those referred to herein above (R. 476):

"Consequently, we pierce the corporate veil which shrouds this intricate transaction, and see Whitney-New Orleans attempting to establish a branch in Jefferson Parish in violation of 12 U.S.C. §36(c). *It is a bootstrap operation by which Whitney-New Orleans, using its own funds in corporate maneuvering, seeks to establish a branch in prohibited territory. Like Jacob of old, Whitney-New Orleans covered its hands with the Esau-like plan of reorganization and, despite the tell-tale*

¹⁵ This statement, referred to by the Court of Appeals in its opinion, was contained in a letter, written by the President of Whitney-New Orleans, on a letterhead of Whitney-New Orleans, to the Comptroller, and with this letter he enclosed the original application for leave to organize Whitney Jefferson (R. 380, 381). The letter was signed by Mr. Berry in his capacity as President of Whitney New Orleans (R. 381).

sound of its own voice, obtained the blessing of the Comptroller of the Currency. Unlike Isaac, however, the Comptroller was not gulled by the ruse; *acting ultra vires in the circumstances shown, he knowingly permitted it because he considered the end desirable, and because he thought the corporate maneuvering impervious to attack.* But, when the corporate veil is pierced, it becomes apparent that both voice and hands were those of Whitney-New Orleans." (Italics supplied).

A. The Decision of the Court of Appeals Was Based On the "Realities" of This Case. Mere Differences In "Form" Do Not Salvage Corporate Devices Established to Evade the Law.

Petitioners urge this Court to reject the aforesaid decision of the Court of Appeals on the basis of their contention that, *in form only*, Whitney Jefferson, as a holding company subsidiary, might differ *in some minor respects* from an otherwise normal bank branch.¹⁶ However, the law is firmly settled in cases of this nature that—

"Realities, in short, and *not mere form* must be considered by the courts . . .

"In short, it is the use to which the *corporate form* is put which controls and the facts in the particular case will determine the course of relief."

See *Francis O. Day, Inc. v. Shapiro, supra*; 30 O.J.S. 107, p. 513—"Equity regards substance rather than form."

¹⁶ Whitney's brief states, at page 27: "... the *form of organization* chosen by petitioner is determinative so far as the applicability of the branch banking law is concerned."

And, at page 40: "The Court of Appeals' opinion is an exercise in unreality . . . It ignores the real distinctions between these *forms of organizations* . . ."

Stripped of its sophisticated format, petitioner Whitney's brief is found still to contain various admissions which are directly pertinent to the "*realities*" of this case. Although these admissions are dispersed, like rabbits in the forest, they are still capable of definite recognition as follows:

(i) at page 5: "Whitney-New Orleans determined that it, too, should establish a relationship with a bank in Jefferson Parish."

(ii) at pages 5, 6: "Accordingly, Whitney . . . developed a program for the creation of a . . . bank in Jefferson Parish. It would be a separate corporation, *but through the vehicle of a holding company . . .*, it would be under the *same ultimate ownership as Whitney New Orleans.*"

(iii) at page 6: "Whitney-New Orleans would pay to Whitney Holding . . . \$650,000. Whitney Holding would use these funds to establish . . . Whitney Jefferson."

(iv) at pages 6, 7: "It was, of course, contemplated that . . . Whitney Jefferson would rely substantially on the *management experience* which over the years had inspired the confidence of Whitney-New Orleans' customers."

(v) at page 18: ". . . important benefits do accrue from cooperation between related banks with substantial identity of ownership and management. Establishment of a holding company offers the further advantage of *assuring continuing identity of ownership . . .*. The creation of Whitney-Jefferson reflected a decision in favor of the *holding company approach.*"

(vi) at page 27: "Of course, holding company banking is similar in some practical respects to branch banking . . ."

(vii) at page 34: "What he (the President of Whitney New Orleans) did . . . was to point out

to the stockholders . . . those benefits of *branch banking* . . . permitted under a bank holding company plan . . .”

(viii) at page 38: “*Control*. The court’s second point was that the new bank would be subject to *ultimate management and control by the executives of the metropolitan bank*. Of course it would . . . (T)his is the *most common purpose of establishing a bank holding company*.”

(ix) at page 39: “*Names*. The court’s third point is that the name Whitney National Bank in Jefferson Parish is susceptible of confusion with the name Whitney National Bank of New Orleans. . . . In this case, the name of course would suggest, and was meant to suggest, *close connection between the banks and the benefits of experience and reliable management, high integrity and the best banking connections*.”

There are, of course, other even more candid and damaging admissions in the Record before this Court, to which neither petitioner dared to allude. At page 67 of the Record, the President of Whitney New Orleans testified:

— “The management of (Whitney Jefferson) will be supplied from the Whitney National Bank of New Orleans. That unit will have the benefit of the training program of the old bank and can select the personnel best adapted to its needs.”

And, at page 68 of the Record, Whitney’s President testified:

“The Whitney National Bank of New Orleans will continue in exactly the same form as it is now except for the withdrawal of \$650,000 *in capital*

funds which will be put into the Jefferson Parish unit as capital for it."¹⁷

At page 72 of the Record, Whitney's President, stated:

"I think that is one of the most important services a bank renders aside from lending money, discussing the customer's problems with him and helping him arrive at a proper decision, letting him convince the bank management that his plans are correct and are right.

"He would not feel that he had that privilege of coming in to the larger bank's senior officers unless there were that common ownership of the two banks.

"With the common ownership, he would have no hesitancy to come over; he would feel it is all the same general situation." (Italics supplied).

The Record also shows that the type of checks proposed to be used by Whitney Jefferson contain in bold, large letters the words "*Whitney National Bank*," while the words "in Jefferson Parish" are printed in tiny caps (R. 125-131). A specimen of these checks is included in the Appendix to this brief. The same type of printing is proposed for the letterheads of Whitney

¹⁷ At page 36 of its brief, petitioner Whitney states: "Withdrawal of 'capital' from a national bank 'either in the form of dividends or otherwise' is prohibited by law (12 U.S.C. § 56)." While learned counsel for this petitioner now seek to call the \$650,000 withdrawal from Whitney a "dividend," the President of Whitney, prior to this suit, frankly described it as a "*withdrawal of capital*." In either event, we strongly suggest, as we did in the District Court and the Court of Appeals, that this is just another example of the illegality here involved, and that the withdrawal violates not only the National Bank Act, but the intent and purpose of 12 U.S.C. 1845 as well.

Jefferson (R. 128), a specimen of which is also included in the Appendix.

The Record also reflects that the bank furnishings and equipment for Whitney Jefferson were to be taken from the quarters of Whitney New Orleans (R. 382). Finally, when Whitney New Orleans asked certain of its friends to write letters for the record, supporting its proposal to open offices in Jefferson Parish, each wrote substantially or typically as follows (R. 366-371, at 366):

“Whitney National Bank,
Main Office,
New Orleans, Louisiana

“... I understand that you are contemplating the establishment of a *branch bank* to be located in the vicinity of Jefferson Highway

“While I cannot speak for our management at Plymouth, I can definitely state that a *branch of your institution located on Jefferson Highway* would mean a great deal to us

“I shall continue in my efforts to increase our activity with the Whitney, and your contemplated new office should certainly strengthen your sales effort with our management to secure a greater portion of our New Orleans business” (Italics supplied).

These, we submit, are unfettered ‘*realities*’ of this case, and taken together with those contained hereinabove in this brief and in the decision of the Court of Appeals, they patently direct that said decision was correct and proper in every respect.

B. Under the "Realities" of this Case, Petitioner Whitney Was Formed to Operate as an Illegal Branch or Additional Office of Whitney New Orleans, and There Are No Provisions of the National Bank Act or of the Federal Bank Holding Company Act Which Require the Rescue of This Illegal Proposal.

It hardly seems appropriate for petitioner Whitney Jefferson to argue, as it does at pages 28, 29 of its brief, that while Whitney New Orleans will enjoy most of the advantages of a branch relationship with it, under the National Bank Act (12 U.S.C. 91, 93), its depositors, in the event of its insolvency, will be able to "look only to Whitney-Jefferson's assets and would have no claim on those of the city bank"; and that its local directors alone "would be liable for a violation by that bank of the National Bank Act." These certainly would not seem to be reasons for this Court "to apply the general principle of equity" referred to at page 56 of Whitney's brief and thus reverse the judgments of the lower courts in the case at bar.

In essence, Whitney has thrown the light on further hidden dangers which are inherently involved in its illegal plan to evade the law. Whitney New Orleans will thus be free to reap all of the benefits of a branch relationship with Whitney Jefferson, but depositors in Whitney Jefferson will have no claim on the \$30,000,000. of capital and surplus held by Whitney New Orleans if Whitney Jefferson, capitalized with only \$650,000., should become insolvent. And, while Whitney Jefferson admittedly will "*be subject to ultimate management and control by the executives of the metropolitan bank*" (Whitney brief, p. 38), *only Whitney Jefferson's local, "dummy directors" will be liable for violations of the National Bank Act.*

Moreover, petitioner Whitney argues, at pages 27-29 of its brief, that the Court of Appeals "lost sight of

the crucial practical respects" in which the two banks planned to operate when it failed to recognize that "the Federal Bank Holding Company Act (12 U.S.C. 1845) prevents any mingling of funds between a bank holding company and a subsidiary or among subsidiaries." *Indeed, this is simply another totally unlawful aspect of Whitney's plan before this Court, and the Court of Appeals expressly recognized it when it held (R. 476):*

"It is a bootstrap operation by which Whitney-New Orleans, *using its own funds in corporate maneuvering*, seeks to establish a branch in prohibited territory." (Italics supplied).

In fact, in the Complaint filed in this action by Respondents on June 9, 1962, it is specifically alleged (R. 12, 13):

"13. Plaintiff's assert that the aforementioned scheme for evasion of federal and state banking laws is not only in direct violation of the letter and intent of Title 12 U.S.C. 36, but it is also in violation of the intent of the following provisions of the Bank Holding Company Act, Title 12 U.S.C. § 1841, et seq.:

(i) Title 12 U.S.C. § 1845, which provides:

"(a) From and after May 9, 1956, it shall be unlawful for a bank—

(1) to invest any of its funds in the capital stock, bonds, debentures, or other obligations of a bank holding company of which it is a subsidiary, or of any other subsidiary of such bank holding company.
..."

Consequently, as pointed up by Whitney itself in its brief, the unlawful plan before this Court involves not

only a purposeful evasion of Section 36(c) of the National Bank Act, but also an intentional violation of the purpose of the so-called "*upstream financing prohibitions*" of the Federal Bank Holding Company Act (12 U.S.C. 1845). *The sole funds possessed by the synthetic Whitney Holding Company were drawn "upstream" out of Whitney New Orleans, and this violated the intent of 12 U.S.C. 1845.*

Petitioners also complain that "the Court of Appeals apparently ignored the . . . sworn affidavit (R. 388-91) of Mr. Gilly, the President of Whitney Jefferson, which . . . shows that it was not intended that the two banks be operated as one." On the contrary, we submit that petitioners themselves have elected to ignore the substance of that affidavit, which, although prepared after this action was begun, still supports the decision of the Court of Appeals and shows:

(1) that he, Mr. Gilly, will simultaneously serve as President of Whitney-Jefferson, and as Executive Vice President of Whitney New Orleans (R. 388);

(2) that at least 4 "local directors" of Whitney Jefferson will also simultaneously be "local directors" of Whitney New Orleans (R. 388);¹⁸

(3) that Whitney Jefferson "will establish correspondent bank relations with the Whitney-New Orleans" (R. 389);

(4) that "the capital and surplus of Whitney-Jefferson is \$600,000. and the capital and surplus of

¹⁸ Both boards, of course, will be at all times subject to the "*ultimate management and control*" of the officers and directors of the Holding Corporation, who will be the principle officers and directors of Whitney New Orleans.

Whitney New Orleans is \$30,000,000. and because of the loan limit which, in most cases, is 10% of the capital and surplus, *Whitney-Jefferson may in its discretion offer participations in loans to Whitney New Orleans . . .*" (R. 389);

(5) "... that Whitney Jefferson proposes to clear through Whitney New Orleans" (R. 389);

(6) that Whitney Jefferson will remit customers' deposits, where requested, to Whitney New Orleans (R. 389); and

(7) that Whitney Jefferson will cash checks drawn on Whitney New Orleans for any of its customers in order to "gain favor with the person cashing the check" (R. 389, 390).

Again, we submit, that the true 'realities' of this case direct an affirmance of the decision of the Court of Appeals.

C. The Court of Appeals Correctly Distinguished The "Realities" of This Case From Those of the Billings and Camden Decisions.

The brief filed on behalf of the Comptroller no longer makes any attempt to contend that the decision of the Court of Appeals in this case collides with the same Court of Appeals' decision in *Camden Trust Co. v. Gidney*, 112 U.S. App. D.C. 197, 301 F. 2d 521 (1962), cert. denied, 369 U.S. 886 or with the decision of the Ninth Circuit in *First National Bank in Billings v. First Bank Stock Corp.*, 306 F. 2d 937 (CCA 9, 1962). In fact, the Comptroller readily concedes, at page 61 of his brief, that in *Billings*, the Ninth Circuit held—

"That there might be circumstances in which a separately chartered bank owned by a bank holding company might be treated as a branch (306 F. 2d at 943)."

Petitioner Whitney, however, continues to berate the Court of Appeals by contending that its decision here cannot be reconciled with either *Camden* or *Billings*; and that the alleged conflict results exclusively from the District of Columbia Circuit's "misunderstanding of the transactions involved or lack of familiarity with the nature and development of modern banking" (Whitney brief, pg. 36). *But, two of the three judges who concurred in the decision in the case at bar actually constituted the majority of the District of Columbia Circuit in Camden.* They, above all others in the world, were certainly best qualified and equipped to recognize the fundamental differences between the 'realities' of this case and the 'realities' of *Camden*—and indeed, they did just that, and stated (R. 476, 77):

"Whitney of New Orleans considered the 'affiliate' arrangement we approved in the *Camden* case, and decided not to use it because it *does not* permit the identity of ownership provided by the holding company device, and because it *does not* assure that even the permitted affiliation will remain constant.

"Quite unlike the sum total of the several factors which led us to approve the 'affiliate' status in the *Camden Trust* situation, we need observe only that here, *inter alia*, the holding company is not providing Whitney Jefferson with new and fresh capital, but with capital supplied by Whitney-New Orleans; the new bank will be managed and controlled by the executives of Whitney-New Orleans; and the name, Whitney National Bank in Jefferson Parish (the last three words in small letters on its checks and other forms), is easily susceptible of confusion with the parent organizer, The Whitney National Bank of New Orleans."

The Solicitor General's brief, of course, readily concedes, at page 4, that Whitney expressly considered the possibility of the establishment of a *Camden*-type "affiliate", but rejected it "in order to assure a continuity of relationship between the new and old bank, and to avoid any conflict of interest in transactions between the banks." The Court's attention is also directed to the testimony of the President of Whitney-New Orleans, at page 71, of the Record, where he states:

"As we see it, in an affiliate relationship, we have no way of knowing or no way to prevent the stock of the two institutions from drifting apart. It is my understanding that if, in the case of an affiliate, less than 50% of its stock is owned by the stockholders of the other bank—in other words, if the common ownership drops below 50%—supervisory authorities must require that there be no interlocking of officers or directors.

"This could happen in a period of stress and be embarrassing to both banks. . . .

"In an affiliate relationship with different stockholders, there is a constant conflict of interest as between those stockholders in every transaction between the two banks. With interlocking officers and directors, every transaction is open to question as to which bank had the advantage in the transaction.

"That could be eliminated under the approach we have taken." (Italics supplied).

The Court of Appeals was equally correct and clear-cut in its analysis of the vast differences between the holding company system involved in *Billings* and the synthetic holding company established by Whitney

solely for the purpose of evading the law. The Court stated, at R. 474:

"The *Billings* case is far from being factually on all fours with the present case. There the bank holding company was organized in 1929, and had been operating in that capacity for 30 years. It possessed stock in 87 banks with 94 offices. Thus, it was not created or organized by a bank, as *Whitney Holding* was, solely for the purpose of opening a branch office of that bank. It was the traditionally recognized bank holding company which, with its own capital, invests in or buys the stock of banks. It was not the type of holding company here involved, whose only capital was the money siphoned through it by *Whitney-New Orleans* to open *Whitney Jefferson* in a prohibited location." (Italics supplied).

The Court of Appeals, therefore, concluded with regard to *Billings* (R. 475):

"We agree with the Ninth Circuit that the corporate veil should be pierced whenever one bank is 'doing business through the instrumentality of' the other or 'in the same way as if the institutions were one.' 'The unitary type of operation,' said in the *Billings* opinion to be 'characteristic of branch banking,' is present here. In such circumstances, the relation of parent and branch exists, even though the banks are separate corporate organizations."

We suggest that the fundamental and fatal weakness which runs throughout petitioners' briefs before this Court is their blind refusal to recognize, as the Court of Appeals did, the essential differences which exist, from the very outset, between (a) a *bona fide* bank holding company, established by investors to invest its own capital funds in the stocks of several different banks, and (b) the *Whitney*-type, synthetic holding

company, established by a bank, solely and admittedly as a 'device' and for the purpose of using that bank's funds alone to open a branch at a location prohibited by Section 36(c) of the National Bank Act.

When this distinction is clearly understood, it becomes evident that the decision of the Court of Appeals herein must be affirmed if the branching prohibitions of the National Bank Act are to be sustained at all.

D. The Court of Appeals Thus Properly Rendered Summary Judgment in Favor of Respondent Banks.

As stated by the Solicitor General, at page 11 of his brief:

"The gravamen of the Complaint (herein) was that Whitney-Jefferson was a branch bank within the meaning of the Banking Act of 1933 (12 U.S.C. 36 . . .), and that its establishment was therefore prohibited by law (R. 6-20)."

Petitioner Whitney likewise admits at page 32 of its brief, that respondent's, from the very beginning of this action, "did allege that Whitney-Jefferson was in law a 'branch' and that the purpose of the Whitney program was to 'evade' the branch banking laws"

Whitney, however, now contends for the very first time before this Court, that it was "inappropriate for the Court of Appeals to decide such a question on summary judgment" (Whitney brief, p. 33). The sole basis asserted for this contention is that the President of Whitney-New Orleans, Mr. Berry, was thus given "no opportunity to explain" some of his testimony and statements, *which had been filed in this case by petitioners themselves*, and which the Court of Appeals took at face value when it rendered its decision herein. Mr. Berry, of course, is still the President of Whitney-

New Orleans and Whitney Holding Corporation, and he is a banker with more than 25 years of experience as the head of the largest bank in Louisiana. It is inconceivable therefore, that he knew not what he said when he candidly explained why his bank formed the holding company device and how his bank intended to operate it to evade the banking laws.

In any event, this must be the only time in the memory of this Court that any party sought to reverse a decision of a Court of Appeals on the ground that the lower court erred by accepting as true and by taking at face value the petitioner's own prior written statements and formal testimony, and that a trial was required to give the petitioner a chance to rebut its own case. As late as April, 1963, however, this Court did deny certiorari in a case where a similar, *although not as bizarre*, contention was advanced (*Atlas v. Eastern Airlines, Inc.*, 311 F. 2d 156, 162 (CCA 1, 1962), *cert. denied*, 373 U.S. 904 (1963)). In that case, the First Circuit stated, at page 162:

"Plaintiff also urges here that the district court erred in granting the motion for summary judgment because the record indicated that the credibility of the affiants . . . was in serious question Be that as it may, counsel for plaintiff did not seek to raise this question below, nor did he attempt to cross-examine the affiants in this regard Consequently, he cannot be heard, now."¹⁹

¹⁹ See also *N.L.R.B. v. Pittsburgh S.S. Co.*, 340 U.S. 498, 503 (1951), where this Court stated: "It is not for us to invite review by this Court of decisions turning solely on an evaluation of testimony"; *Bloeth v. New York*, 82 S. Ct. 661, 662 (1962), where this Court ruled: "It appears on the face of the present application that the two questions proposed for review were not raised in the Court of Appeals until . . . the motion for reargument. In such circumstances, it is clear that this Court would be without jurisdiction to consider them."

Moreover, until the proceedings before this Court, all parties to this action readily conceded that a decision in this case would necessarily turn *exclusively on questions of law*. On the basis of the very same Record now before this Court (which exceeds 450 printed pages), the Comptroller was the first to move for summary judgment. Cross-motions for the same relief were then promptly filed by respondents and petitioner Whitney. All parties agreed in their motion papers that "there is no genuine issue herein as to any material fact." When these motions came on before the District Court, Judge McLaughlin stated at the very outset (R. 431):

"The Court will ask counsel on both sides to respond to the question of the Court as to whether there is any substantial question of fact involved in this case, or whether it is *fully agreed* by all that the question to be presented to the Court is strictly a question of law.

"We all know if there is any substantial question of fact that is a bar to the Court proceeding in a motion for summary judgment."

Petitioner Whitney, which now seeks to contend, for the first time after decision of the Court of Appeals, that this case was not ripe for summary judgment, thereupon advised Judge McLaughlin as follows (R. 431, 432):

"*Mr. Acheson*: Your Honor, I would say as to that, there is no disagreement as to the facts between the intervening defendant and the plaintiffs, if by fact we mean an event, something which occurred and can be reported; if we mean a conclusion which is drawn from that, there are different conclusions. These I submit and we have submitted in papers filed with Your Honor *are mere*

conclusions of law, or conclusions to be drawn from undisputed facts. There are no facts as such which are in dispute. This is my assertion to Your Honor . . . I know of no event, no specific occasion, nothing which was done upon which there is any difference between us. (Italics supplied).

The District Court thereupon agreed to hear the motions for summary judgment. It received full oral argument and briefing on the Section 36(c) issue, and while that court found it unnecessary to decide said issue, it made and filed detailed Findings of Fact setting forth a basis for such a decision on appeal if necessary (R. 446). The Court of Appeals then received even more extensive briefing and oral argument from both petitioners and respondents on the Section 36(c) issue, and of course, finally elected to enjoin the statutory evasions involved on the grounds hereinabove recited.

It seems clear, under the facts and circumstances presented, that there could never be a case more fully suited for summary judgment than this one. And, insofar as the effect of Whitney-New Orleans' "intent" in this case is concerned, it was settled in *Metropolitan Holding Co. v. Snyder, supra*, at page 268, as follows:

"The incorporators of the holding company may have acted in good faith according to their standard of right, but under the facts of this case, as disclosed by the record, they must be judged by the legal effect of what they deliberately did. If . . . the corporation was merely an instrumentality set up for their own convenience in holding title to the shares, then in equity it matters not what design, good or evil, prompted their actions; from either source, the effects of their actions—the avoidance of statutory liability—are the same."

II.

THE COURT OF APPEALS' DECISION IS WHOLLY IN ACCORD WITH AND GIVES GREAT FORCE AND EFFECT TO A POLICY CONGRESS HAS BEEN SEEKING TO ACCOMPLISH FOR APPROXIMATELY 35 YEARS.

Petitioners would apparently have this Court believe that Congress has historically and continuously favored Whitney-type bank holding company devices, and has thus consistently voted to leave national banks, anxious to evade the branching restrictions of the National Bank Act, free to adopt such devices specifically as a means for defeating the law (Solicitor General's brief, p. 17; 46-64; Whitney brief, p. 16-27). Petitioners have sought to create this atmosphere by employing out-of-context excerpts from Congressional debates and committee reports; but when these are examined, it becomes clear that *the Congressional policy has been exactly opposite to that alleged by petitioners; and that the Court of Appeals' decision herein is completely in accord with and in support of that federal policy.*

The National Bank Act, as passed in 1864, provided that a national bank could do business only at the "place" or "office" specified in the articles of association.²⁰ Consequently, the Comptroller of the Currency consistently interpreted the Act as authorizing a national bank to do business in no more than one office, and therefore as prohibiting branch banking for national banks.²¹ This Court also adopted that interpretation.²²

In 1911, one of the large New York national banks, *almost exactly like Whitney-New Orleans in the case*

²⁰ R.S. §§ 5134, 5190.

²¹ Chapman, "Concentration of Banking," pp. 110-111.

²² *First National Bank of St. Louis v. Missouri*, 263 U.S. 640.

at bar, created a holding company device through which it might evade and defeat the said branching prohibitions as well as other restrictions of the National Bank Act.²³ The President of the United States asked the Attorney General to furnish him with a formal opinion as to the legality of these maneuvers, and the Attorney General, in turn, requested same from the Solicitor General.²⁴ On November 6, 1911, the Solicitor General issued a written opinion, and the Attorney General concurred therein.²⁵ Because of its importance to a basic understanding of the Federal policy against the employment by National banks of holding company devices to evade the prohibitions of the National Bank Act, a copy of said opinion has been printed and is contained in the Supplemental Appendix to this brief.

Unlike the Solicitor General's brief in the case at bar, which argues that "the branch-banking restrictions . . . are not applicable to separately chartered banks owned by a holding company," the Solicitor General's Opinion in 1911 ruled that *a holding company device, created by a national bank to evade the prohibitions of the National Bank Act, was "in usurpation of Federal authority and in violation of Federal law"*²⁶ The Solicitor General, like the Court of Appeals in the case at bar, found the prohibitions of the National Bank Act to be "matters of substance," and he stated that they could be "*no more evaded than violated.*"²⁷ "*Indirection,*" he said, "*if it accomplishes the same*

²³ 75 Cong. Record 9899, May 10, 1932.

²⁴ 75 Cong. Record 9899, May 10, 1932.

²⁵ 75 Cong. Record 9898, 9899, May 10, 1932.

²⁶ 75 Cong. Record 9904, May 10, 1932.

²⁷ 75 Cong. Record 9901, May 10, 1932.

purpose, stands upon the same footing with direction."²⁸ The Solicitor General thus concluded:²⁹

"We are dealing with corporations of a public character, with national banks, which have public duties to perform, and of these it is a peculiar obligation 'to maintain independent corporate existence and not to surrender control of their affairs or the exercise of their powers to another corporation' . . .

"Where public law and public policy are involved, forms and fictions are disregarded and the facts are dealt with as facts . . ." (Italics supplied).

Such was the state of the law and the federal policy against Whitney-type holding company evasions of the National Bank Act as early as 1911, approximately 53 years ago.

In 1927, Congress passed the McFadden Act, which liberalized the branching restrictions of the National Bank Act to permit national banks to establish branches within those cities in which State banks had the same privilege on the date the Act became effective.³⁰ In other words, *Congress adopted State law as the measuring rod by which national banks would be permitted to branch*, and in States which denied or restricted branching for State banks, branching was likewise denied or restricted for national banks.³¹

In 1930, shortly after the banking panic of 1929, the Senate authorized its Banking and Currency Commit-

²⁸ 75 Cong. Record 9901, May 10, 1932.

²⁹ 75 Cong. Record 9903, 9904, May 10, 1932.

³⁰ Sec. 7(c), 44 Stat. 1228.

³¹ Senate Report 473, 69th Cong., 1st Sess., p. 8.

tee to study all of the banking systems of the country and to report back as soon as possible.³² This study was made under the chairmanship of Senator Carter Glass of Virginia. In 1932, the Committee filed its Report.³³ The growth of holding company devices was described as a drastic "*perversion of the national banking and State-banking laws,*" and as a major reason why so many "hazardous losses" had occurred.³⁴ The Committee, however, stated:³⁵

"Since the (holding) companies are State corporations, Congress has no control over them, except that which may be voluntarily granted

"It is thought that, in any event, holding companies should not be allowed, except in a severely limited way, to vote at elections of Federal Reserve bank directors, since otherwise the Federal Reserve bank would become merely the creature of the holding company"

When the Senate Committee prepared legislative proposals to deal with these conditions, it suggested that national banks be permitted to engage in State-wide branching.³⁶ On the floor of the Senate, Senator Glass explained the purpose of that proposal as follows:³⁷

"*Mr. Glass:* What we want to do is to break up chain banking, which is an irresponsible species

³² 71st Cong., 2d Sess., S. Res. 71.

³³ Senate Report 584, 72d Cong., 1st Sess.

³⁴ Senate Report 584, 72d Cong., 1st Sess., p. 9.

³⁵ Senate Report 584, 72d Cong., 1st Sess., p. 10.

³⁶ Senate Report 584, 72d Cong., 1st Session.

³⁷ 75 Cong. Record 9893.

of banking, and substitute for it branch banking, which is an entirely responsible species of banking."

Still later in the floor debate on May 10, 1932, Senator Glass advised the Senate that he had fortunately been able to uncover a copy of the Solicitor General's "holding company device" Opinion of November 6, 1911, referred to hereinabove.³⁸ He stated with reference to said Opinion:³⁹

"... it will appear from the language thus used that this was not merely the opinion of the Solicitor General but it was an opinion concurred in by the Attorney General. *Why it was not acted on, why the Comptroller of the Currency, having supervision and control under the law of the national banking system, was not supplied with this opinion for his guidance, why it apparently disappeared from the face of the earth and could only be found in the original form, of which I have been furnished a photostatic copy, is something that I can only conjecture.*

"... It ought to have been supplied to the Comptroller of the Currency. *It seems to me that, fortified with an opinion of that sort, the Comptroller of the Currency, ... was under an obligation to break up these illicit practices and the establishment by national banks of affiliates.*" (Italics supplied).

As the Senate proceeded with its consideration of the Bank Act of 1933, the synthetic Whitney-type "holding company device" was repeatedly referred to as "the instrument of some large bank seeking to build

³⁸ 75 Cong. Record 9898.

³⁹ 75 Cong. Record 9899.

up a branch-banking system which is not permitted by law";⁴⁰ as "this Frankenstein in banking;"⁴¹ as an "evasion of the law";⁴² as "vicious";⁴³ as fraught with "the evils of indirect control";⁴⁴ as "unscrupulous contributors to the financial catastrophe . . . and mainly responsible for the depression".⁴⁵ The result finally was the passage of Section 36(c) of the National Bank Act in substantially its present form. Congress apparently believed, as stated by Senator Glass, that the more liberal branching restrictions of Section 36(c), as amended by the Bratton amendment adopted on the Senate floor, would cause national banks voluntarily to reject the Whitney-type "holding company device", and that the Comptroller of the Currency would henceforth seek to enforce the "rule" of Solicitor General Lehmann's Opinion, which had been disinterred after being mysteriously buried for 21 years.

By 1938, however, President Roosevelt found it necessary to send a special message to the Congress, urging the adoption of legislation "that would effectively control the operation of bank holding companies; prevent holding companies from acquiring control of any more banks, directly or indirectly; prevent banks controlled by holding companies from establishing any more branches; and make it illegal for a holding company to borrow from or sell securities to a bank in which it holds stock."⁴⁶ A bill was introduced by

⁴⁰ 75 Cong. Record, 9975.

⁴¹ 75 Cong. Record 9984.

⁴² Senate Report 584, Part II, p. 2, 72d Cong., 1st Sess.

⁴³ 76 Cong. Record 1997.

⁴⁴ Senate Report 77, 73rd Cong., 1st Sess., p. 10.

⁴⁵ 76 Cong. Record 3726.

⁴⁶ S. Doc. 173, 75th Cong., 3d Session.

Senators Glass and McAdoo to carry out these recommendations.⁴⁷ Similar bills were introduced in the 77th, 79th, 80th, 81st and 83rd Congresses, but were not passed. Finally, in the 84th Congress, the Federal Bank Holding Company Act was enacted into law.⁴⁸

The House Report in support of the said Act states: "Evidence developed during the hearings has convinced your committee that bank holding companies are not in accord with the very precepts upon which our banking system rests."⁴⁹ The Report stated that "the bank holding company device threatens to destroy . . . the independent unit bank";⁵⁰ that they are "thwarting national banking policy";⁵¹ that they are being formed to "circumvent the branch banking prohibitions";⁵² that they are susceptible to abuse."⁵³

With reference to the Solicitor General's contention herein that the Court of Appeals erred by applying the branch-banking restrictions "to separately chartered banks owned by a holding company," the House Report specifically stated:⁵⁴

"Great stress has been placed on their difference in form, which everyone of course recognizes. Your committee feels, however, in a large measure they are differences without a distinction

⁴⁷ S. 3573, 75th Cong., 3d Session.

⁴⁸ P.L. 511, 84th Cong., 2d Session.

⁴⁹ House Report 609, 84th Cong., 1st Session, pp. 1, 2.

⁵⁰ House Report 609, 84th Cong., 1st Session, p. 2.

⁵¹ House Report 609, 84th Cong., 1st Session, p. 2.

⁵² House Report 609, 84th Cong., 1st Session, pp. 2, 3.

⁵³ House Report 609, 84th Cong., 1st Session, p. 3.

⁵⁴ House Report 609, 84th Cong., 1st Session, p. 3.

"Bankers certainly should know whether bank holding company subsidiaries can in effect be operated as branches. A bankers' association asked the bankers of the country this question: 'Do you consider holding company banking, in effect, branch banking'? More than 97% of the replies were 'Yes'."

And, when the Holding Company Act reached the floor of the Senate, in 1956, Senator Capehart, ranking minority member of the Senate Committee on Banking and Currency, directed the following question to Senator Robertson, Chairman of the Committee:⁵⁵

Mr. Capehart: Is the object of the bill not to make certain that bank holding companies do not expand, and that bank holding companies shall not be permitted to do that which banks cannot do? Broadly speaking, is that not what is sought to be done?

Mr. Robertson: That is absolutely correct
...."

In essence, therefore, Congress in 1956, recognizing the holding company situation as it existed by that time, went as far as it appropriately could when it passed the Federal Bank Holding Company Act. Not only did it provide a federal regulatory scheme to deal with certain aspects of the traditional holding company operation, but it expressly reserved to the States their right to be "more severe" and even to prohibit holding company operations within their borders.^{55a}

⁵⁵ Cong. Record, 84th Cong., 2d Session, p. 6853.

^{55a} 12 U.S.C. §§ 1842(d), 1846; Sen. Report 1095, Part 2, 84th Cong., 2d Sess., p. 5.

In no respect did Congress, so legislating in this field, intend to provide the Comptroller of the Currency with some new vague authority; as petitioners seem to contend, (a) to meet with a national bank and agree that a holding company device should be adopted as a means of evading the prohibitions of the National Bank Act; (b) to issue a charter to a "phantom bank" to assist the national bank to accomplish its unlawful purpose, knowing that said "phantom" would never commence the business of banking as contemplated by the National Bank Act (12 U.S.C. §§ 21, 24, 27); (c) to approve the merger of the largest national bank in Louisiana into this "phantom," solely to provide a vehicle for eliminating dissenting stockholders of the national bank involved (12 U.S.C. § 215(b), (c)) and without substantial compliance with the requirements of the Bank Merger Act (12 U.S.C. § 1828(c)); and (d) to permit the national bank to siphon off \$1,000,000. of its funds to create a holding company device for the sole purpose of establishing bank offices at a place prohibited by the National Bank Act (12 U.S.C. § 36c).

It is equally clear that Congress, in 1956, did not repeal the rule of law referred to in Solicitor General Lehmann's Opinion, and it did nothing to strip the federal courts of their inherent authority in equity to apply, as the Court of Appeals did here, that rule whenever necessary to uphold the prohibitions of the National Bank Act. In fact, Congress specifically provided, in Section 11 of the Federal Bank Holding Company Act (70 Stat. 139; Note, 12 U.S.C. 1841):

"Nothing herein contained shall be interpreted or construed as approving any act, action, or conduct which is or has been or may be in violation of existing law. . . ."

III.

THE DISTRICT COURT LIKEWISE CORRECTLY ENJOINED THE COMPTROLLER FROM LICENSING UNDER 12 U.S.C. § 27 A BANKING OPERATION FURTHER DIRECTLY PROHIBITED BY THE LOUISIANA BANK HOLDING COMPANY ACT, ADOPTED BY LOUISIANA PURSUANT TO RIGHTS EXPRESSLY RESERVED TO THE STATES BY THE FEDERAL BANK HOLDING COMPANY ACT.

The licensing of Whitney's proposed operation in Jefferson Parish was correctly enjoined not only because it constituted a clear-cut attempt to evade and defeat the prohibitions of Section 36c of the National Bank Act, but also because it is *directly* and expressly prohibited by Section 3(5) of the Louisiana Bank Holding Company Act (Act 275 of 1962, 2 L.S.A.-R.S. 6:1001-6:1006 (1962 Supp.)), which, as here pertinent, provides:

"It shall be unlawful . . . (5) for any bank holding company or subsidiary thereof to open for business any bank not now opened for business"

The said Louisiana statute concededly intended to be directly applicable to petitioner Whitney, was enacted pursuant to the provisions of Section 7 of the Federal Bank Holding Company Act of 1956 (12 U.S.C. § 1846), which states:

"*Reservation of rights to States*—The enactment by the Congress of this chapter shall not be construed as preventing any State from exercising such powers and jurisdiction which it now has or may hereafter have with respect to banks, bank holding companies and subsidiaries thereof."

In *Bracburn Securities Corp. v. Smith*, 15 Ill. 2d 55, 153 N.E. 2d 806 (1958), *appeal dismissed for want of a substantial federal question*, 359 U.S. 311, Illinois, like Louisiana, passed a very similar State Bank Holding Company Act in 1957, pursuant to the reservation of

States' rights contained in 12 U.S.C. § 1846. Braeburn Securities Corporation brought suit in the Illinois courts, *contending precisely as petitioners have done in the case at bar*, that the Illinois statute was (a) unconstitutional and (b) void, insofar as it applied to national bank subsidiaries of bank holding companies. The Illinois Supreme Court upheld the statute as constitutional and as *a proper State regulation of national bank subsidiaries of holding companies within the provision of 12 U.S.C. § 1846*. Braeburn appealed to this Court, contending in a supporting brief (Docket 718, October 1958 Term) precisely as petitioners have been doing in the case at bar, that—

“Ever since *McCulloch v. Maryland*, 4 Wheat. 316—jurisdiction over internal affairs of national banks was exclusively in the Federal Government, and any State law which undertook to limit or control such banks is void”

The State Auditor of Illinois thereupon filed a motion to dismiss Braeburn's appeal. *He contended Illinois had the clear right under 12 U.S.C. § 1846 to regulate or prohibit bank holding companies whether they attempted to operate through national or state bank subsidiaries*. This Court, in a *per curiam* opinion in 1959, granted the motion to dismiss on the ground that the case failed to present a substantial federal question. Dismissal on that ground, of course, is an action even stronger than judicial affirmance (*Milheim v. Moffat Tunnel Improvement Dist.*, 262 U.S. 710, 716, 717 (1923)).

See also: *Opinion of the Justices of New Hampshire*, 151 A. 2d 236, which upheld the proposed New Hampshire Bank Holding Company Act against contentions very similar to those advanced in *Braeburn* and again in the case at bar.

By so ruling in *Braeburn*, this Court simply reaffirmed that national banks, which are instrumentalities of the Federal Government and subject to the paramount authority of the United States, are nevertheless subject to State laws and prohibitions *when-ever Congress so provides* (*Mercantile National Bank at Dallas v. Langdeau*, 371 U.S. 555, 559 (1963)). For example, as demonstrated in Point II of this brief, Congress long before 1956, specifically made State law "the measuring stick for the establishment of branches by national banks" and application of those State restrictions and prohibitions to national banks has been recognized and upheld by this Court and others in the federal system (*United States v. Philadelphia National Bank*, 374 U.S. 321, 328 (1963); *Wayne Oakland Bank v. Gidney*, *Supra*; *Commercial State Bank v. Gidney*, 174 F. Supp. 770, *affd.* 278 F. 2d 871 (D.C. App. 1960)). In certain other instances, Congress has applied State law to fix the allowable capitalization of new national banks (12 U.S.C. § 51); to limit national banks to interest rates prescribed for state banks (49 Stat. 191 (1933), as amended, 12 U.S.C. § 85 (1958)). National banks may be granted trust powers *only* when "not in contravention of State or local law" (76 Stat. 668 (1962), 12 U.S.C. § 92(a)). No conversion of a national bank to a state bank, or its merger with a state bank, may take place in "contravention of the law of the State in which the national banking association is located" (64 Stat. 456 (1950), 12 U.S.C. § 214c (1958)). Congress has also reserved to the States broad areas of taxation of national banks (44 Stat. 223-24 (1926), 12 U.S.C. § 548 (1958)), and Congress has "expressly exercised its power to permit national banks to be sued in certain state courts as well as in federal courts" (*Mercantile National Bank v. Langdeau*, *supra*, at page 560).

Moreover, in the Federal Bank Holding Company Act, Congress went to great detail to make it clear that the Reservation of States' Rights contained in Section 7 of the Act applied to *both* national and state bank subsidiaries of holding companies. In 12 U.S.C. § 1841 (c) it defined the word "*bank*," later employed in 12 U.S.C. § 1846, to include "*any national banking association or any State bank*." The word "*subsidiary*," also later employed in 12 U.S.C. § 1846, was defined at 12 U.S.C. § 1841(d) to include "*any company 25 per centum or more of whose voting shares . . . is owned or controlled by [a] bank holding company*." And finally, the word "*company*" is even defined, at 12 U.S.C. § 1841(b), to mean "*any corporation*." The sum total of these definitions makes it crystal clear that Congress, in 12 U.S.C. § 1846, fully intended to preserve to the States the right to regulate, control and prohibit, if desired, all bank holding company operations within their respective borders, and to prevent, if necessary, the opening within State borders of any *subsidiary bank*, state or national, owned or controlled by a holding company.

Any remaining doubt in this connection was absolutely dispelled when the Federal Bank Holding Company Act was before Congress in 1955 and 1956. Chairman Spence of the House Committee, and the House Report itself, made it perfectly clear that the Act reserved to the States "every right they have, *now or hereafter*, . . . to regulate banks or bank holding companies."⁵⁶ The Senate Report in support of the bill specifically authorized the States to be "*more severe*," "*more restrictive*" on holding companies and their state or national bank subsidiaries than "this bill em-

⁵⁶ Cong. Record, 84th Cong., 1st Sess., p. 8021; 8044.

powers the Federal authorities to be or such Federal authorities actually are in their administration of this bill"⁵⁷. The Senate Report then concluded:⁵⁸

"It is always of uppermost importance in legislation of this nature to preserve the dual system of National and State banks, and section 7 must be viewed in that light."

Chairman Robertson of the Senate Banking Committee took the floor during the Senate debate on the bill, in 1956, and stated:⁵⁹

"... A State should have the right to permit or prohibit branch banking, and at the same time, it should have the right to permit or prohibit the operation of bank holding companies within its borders

"Therefore, each State may, within the limits of its proper jurisdictional authority, enact legislation to regulate bank holding companies. Mr. President, as an example of the type of legislation the States may enact, I ask unanimous consent to have printed in the Record the text of a bill recently passed by the Georgia Legislature."

The Georgia bill printed in the Congressional Record, at pages 6752, 6753, provided for State control of *both* state and national bank subsidiaries of holding companies.

Furthermore, when the Federal Bank Holding Company Act was before the Senate, Senator Douglas of

⁵⁷ U.S. Code and Congressional News, 1956, p. 2493.

⁵⁸ Senate Report 1095, Part 2, 84th Cong., 2d Sess., p. 5.

⁵⁹ Cong. Record, 84th Cong., 2d Sess., p. 6752.

Illinois offered an amendment, now contained at 12 U.S.C. § 1842(d) and entitled "*Limitation by State Boundaries.*" This provision prohibited approvals by the Federal authorities of any holding company acquisitions in any State by an "outside" or foreign bank holding company or any of its subsidiaries—*unless the State's statutory laws specifically authorized such acquisitions.*

Thus, in the final analysis, the Act contains *two separate provisions*, (12 U.S.C. § 1842(d) and 1846) whereby Congress authorized the States, including Louisiana, to be as severe and as restrictive as conditions warrant in their regulation or prohibition of holding company operations and expansions within their respective borders; and Congress left the States free to enforce those prohibitions irrespective of whether a holding company sought to operate through a state or national bank. Such was the conclusion which undoubtedly supported this Court's dismissal of the appeal in *Bracburn*.

But in the case at bar, Louisiana Act 275 of 1962 has *not* even operated to forbid the opening of a *national bank, already chartered*. *Petitioner Whitney, under the provisions of the National Bank Act (12 U.S.C. § 24), remains today nothing more than a mere corporation or "body corporate."* It has never been licensed to commence the business of banking (12 U.S.C. § 27), and thus it *has not* attained the true status of a "national bank." Thus, there is absolutely no validity whatsoever to petitioners' contention that the Louisiana statute somehow collides with the National Bank Act, and none of the cases relied on by petitioner Whitney, at pages 43-46 of its brief, or by

petitioner Saxon, at pages 70, 71 of his brief, are in any respect apposite.⁶⁰

Nor is there any validity to petitioner Whitney's claim that the Louisiana statute violates the Fourteenth Amendment. Louisiana patently had the constitutional right to exercise its police power to protect and preserve the vital interests of the community (*Stone v. Mississippi*, 101 U.S. 814; *Douglas v. Kentucky*, 168 U.S. 488; *Home Building and Loan Association v. Blaisdell*, 290 U.S. 398, 437, 444-448; *East New York Savings Bank v. Hahn*, 326 U.S. 230, 233). In fact, in *Ferguson, Attorney General of Kansas v. Skrupa*, 372 U.S. 726 (1963), this Court held that Kansas clearly had the right to outlaw the business of "debt adjusting" and to prohibit existing "debt adjusters" from continuing to operate. It was stated, at pages 731, 732:

"We conclude that the Kansas Legislature was free to decide for itself that legislation was needed to deal with the business of debt adjusting We refuse to sit as a 'superlegislature' to weigh the wisdom of legislation," and we emphatically refuse to go back to the time when Courts used the Due Process Clause 'to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.' Nor are we able or willing to draw lines by calling a law 'prohibitory' or 'regulatory.'"

⁶⁰ In fact, the Federal Reserve Board itself, in a case decided by it *after* the decision of the District Court in this action, actually applied Nebraska law to deny a holding company application for the acquisition of stock in a national bank (*Trans-Nebraska Co.*, FRB No. BHIC-66. Excerpts from that decision are included in the Supplemental Appendix to this brief.

Petitioner Whitney is also powerless to contend that Act 275 denies "equal protection." It clearly applies equally to all bank holding companies, foreign or domestic, to all commercial banks, and to all holding company subsidiaries as therein defined (6 La. R.S. 1001, 1002). It is in no respect discriminatory and it prohibits the same holding company operations to all concerned without favor or caprice. The fact that Whitney was the only organization attempting to thwart the public policy of the State when the law was passed was Whitney's fault—not the State's.

IV.

THE COURT OF APPEALS AND THE DISTRICT COURT CORRECTLY HELD THAT RESPONDENT BANKS HAD STANDING TO SUE THE COMPTROLLER OF THE CURRENCY TO ENJOIN HIM FROM ARBITRARILY AND CAPRICIOUSLY LICENSING AN UNLAWFUL OPERATION, AIMED AT DEFEATING THE NATIONAL BANK ACT WHICH IT IS HIS DUTY TO ADMINISTER. SUCH SUIT IN NO RESPECT CONSTITUTES A COLLATERAL ATTACK UPON A DECISION OF THE FEDERAL RESERVE BOARD MADE UNDER A DIFFERENT STATUTE AND INVOLVING TOTALLY DIFFERENT MATTERS AND DIFFERENT PARTIES.

A. Respondent Banks' Standing To Sue

In its Findings of Fact in support of the Permanent Injunction herein, the District Court found that respondent banks had proved, through *sworn, uncontradicted* facts, that, if the Comptroller of the Currency was not prohibited from issuing his Certificate of Authority to Whitney-Jefferson, each of the respondent banks would sustain serious, irreparable injury and damage (R. 448). The District Court therefore concluded (R. 449):

"5. Plaintiff and intervening plaintiff banks, faced with proposed invasion of property rights and injury from the proposed unlawful issuance

by defendant Comptroller of a Certificate of Authority to intervening defendant Whitney-Jefferson, have standing to bring this suit, and they have no other adequate remedy at law (*Wisconsin Bankers Association v. Robertson*, 190 F. Supp. 90, 94, *affd.* 294 F. 2d 714 (App. D.C.), *cert. denied* 368 U.S. 938, *rehearing denied* 368 U.S. 979 (1961); *Commercial State Bank v. Gidney*, 174 F. Supp. 770, *affd.* 278 F. 2d 871 (D.C. App., 1960); *Wayne Oakland Bank v. Gidney*, 252 F. 2d 537, *cert. denied*, 358 U.S. 830)."

More specifically, respondents, Bank of New Orleans and Bank of Louisiana proved *without contradiction from either petitioner*, that they maintain their banking offices entirely within the Parish of Orleans, and that they are prohibited by the same laws, which heretofore have also prohibited Whitney National Bank of New Orleans, from establishing any banking facilities whatsoever in Jefferson Parish or any parish of Louisiana other than Orleans (R. 201, 303). Each of these two respondents, however, proved that they have "a very large number . . . of customers, depositors and borrowers who reside in and are principally located in *Jefferson Parish*," where the Comptroller proposes *unlawfully to license Whitney to open and operate, in violation of the federal and state statutes* (R. 201, 202; 303). Respondent, Bank of New Orleans, proved that it possessed checking accounts at its New Orleans offices of depositors *from Jefferson* in the sum of \$2,029,000.; such accounts being maintained by 2,812 individuals and businesses (R. 202). These deposits represented 12.3% of that respondent's total deposits (R. 202). In addition, said Bank of New Orleans proved it possessed commercial loans (in excess of \$10,000.),

and promissory notes and other indebtednesses from persons and businesses and secured by property located in *Jefferson Parish*, amounting to approximately \$3,410,000. (R. 202). These accounted for approximately 15% of that bank's total commercial loans in excess of \$10,000.00. In addition, said respondent also had loan accounts of less than \$10,000. in "large volume" from other persons and corporations in *Jefferson Parish* (R. 202). Similar uncontroverted proof was presented by respondent, Bank of Louisiana (R. 304).

Each of these respondents then stated in sworn testimony (R. 202, 304):

"Accordingly, should the Comptroller of the Currency authorize the Whitney National Bank of New Orleans, the largest bank in the State, with combined resources of . . . 1 1/2 billion dollars, to open branch bank facilities through one device or another in *Jefferson Parish*, plaintiff(s) would necessarily suffer severe loss of loans, deposits and other business and would sustain damage to (their) business and profits exceeding \$50,000. per year. Additionally, if the Comptroller is permitted to issue the certificate of authority as he proposes to do unless enjoined, (these) plaintiff(s) would have no adequate remedy at law and would be unable to defend (themselves) against the diversion to and appropriation by said Whitney National Bank of a substantial part of the banking business and services now enjoyed. . . ."

Respondent, Guaranty Bank & Trust Company of Lafayette, Louisiana, introduced similar sworn proof of irreparable injury, damage and loss for which it had no adequate remedy at law (R. 305, 306).

Under circumstances such as those set forth hereinabove, this Court recently denied certiorari in two cases wherein it had been held that plaintiff banks had standing to sue (*Wayne Oakland Bank v. Gidney, Comptroller of the Currency*, CCA 6, 1958, 252 F. 2d 537, cert. denied 358 U.S. 830; *Wisconsin Bankers Association v. Robertson*, 190 F. Supp. 90, 94, affd. 294 F. 2d 714 (App. D.C.), cert. denied 368 U.S. 938, rehearing denied 368 U.S. 979 (1961)).

In the *Wayne* case, the Sixth Circuit Court of Appeals ruled, at page 544:

"As to the standing of the Wayne Oakland Bank to maintain its suit, it was faced with invasion of property rights, and injury from a competition that was prohibited by the federal statutes subjecting national banks to the same rules of law as cover the state banks Whether the rights of a party are infringed by unlawful action of an individual or by exertion of unauthorized federal administrative power, it is entitled to have such controversy adjudicated."

In the *Wisconsin Bankers* case, *supra*, Judge Tamm of the United States District Court for the District of Columbia carefully reviewed this Court's decisions in *Alabama Power Co. v. Ickes* and *Tennessee Electric Power Co. v. TVA*, relied on by the Comptroller (at pages 38-40) in his brief, and then rejected the contention there made that plaintiffs lacked standing to sue. He stated, at 190 F. Supp. 90, 94:

"The defendants deny that the plaintiffs have alleged any injury or threat to a particular right of their own and therefore challenge the plaintiffs' status to sue.

"Briefly stated, the defendants rely upon a substantial number of cases cited in the footnote

below which set forth the established principle that in order to have status to sue, the plaintiffs must establish that some legal interest of theirs, personal to them and recognized by law, has been violated to their legal injury. The Court has carefully reviewed the cited cases and finds in them no situation legally comparable to the status of these. . . . Collectively the plaintiffs by federal or state charters are empowered to conduct banking business in the State of Wisconsin. No other institutions are so empowered. The plaintiffs' charter, then, represents a property right which they are entitled by law to protect. As indicated this status differentiates these plaintiffs from all of the plaintiffs in the enumerated cases."

Please see also: *Commercial State Bank v. Gidney*, 174 F. Supp. 770, 780, affd. 301 F. 2d 521 (D.C. App. 1960), wherein the District Court stated:

"The plaintiffs are two state banks within two and a half miles of the proposed location of National's branch; they are seeking to enjoin unlawful competition which threatens them irreparable and immediate damage. . . . Under the circumstances of this case, the Court is of the opinion that plaintiffs have standing to bring this suit."

This Court's decisions in cases where plaintiffs have sought injunctive relief against a Government officer's or agency's attempt to license an unlawful competition or otherwise unlawfully to exceed or ignore the limits of authority provided under a federal statute have not been to the contrary (*Frost v. Corporation Commission*, 278 U.S. 515; *Columbia Broadcasting System, Inc. v. United States*, 316 U.S. 407; *Stark v. Wickard*, 321 U.S. 288). In *Stark v. Wickard*, for example, this

Court discussed the applicable rule as follows, at page 304:

"It is . . . when a complainant possesses something more than a general interest in the proper execution of the laws that he is in a position to secure judicial intervention. His interest must rise to the dignity of an interest personal to him and not possessed by the people generally. Such a claim is of that character which constitutionally permits adjudication by courts under their general powers."

And, with regard to the Comptroller's contention (at page 38 of his brief) that respondent banks have no standing to sue to restrain his alleged unlawful acts because Congress failed to provide for such review in the National Bank Act, this Court stated in *Stark v. Wickard*, at pages 309, 310:

"... the silence of Congress as to judicial review is, at any rate in the absence of administrative remedy,⁶¹ not to be construed as a denial of authority to the aggrieved person to seek appropriate relief in the federal courts in the exercise of their general jurisdiction. When Congress passes an Act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted. This permits courts to participate in law enforcement entrusted to administrative bodies only to the extent necessary to protect justifiable individual rights against administrative action fairly beyond the granted powers. The responsibility of determining the limits of statutory grants of authority in such

⁶¹ The Comptroller, readily admits, at page 38 of his brief, that respondents have never had any administrative remedy under the National Bank Act.

instances is a judicial function entrusted to the courts by Congress by the statutes establishing courts and marking their jurisdiction. . . . *Under Article III, Congress established courts to adjudicate cases and controversies as to claims of infringement of individual rights whether by unlawful action of private persons or by exertion of unauthorized administrative power.*" (Italics supplied).

In *J. B. Montgomery, Inc. v. United States*, 206 F.Supp. 455 (D.C. Colo., 1962), affirmed 376 U.S. 389 (1964), the District Court ruled at page 458:

"Administrative determinations must have a basis in law and must be within the granted authority, and it is a judicial function and not an administrative function to determine the limits of the statutory power."

The District Court went on in *Montgomery* to hold that the agency there involved "was without statutory authority" to act as it had. This Court affirmed in March of this year.

When these principles and authorities are applied to the case at bar, it becomes obvious that the District Court and Court of Appeals both correctly ruled that respondent banks possessed standing to sue the Comptroller to restrain him from licensing a competitive banking operation prohibited to Whitney by law (R. 448, 449; 466-470). As stated below, any denial of such standing would leave the Comptroller in the autocratic position where his wrongs, in violation of the statute he administers, would be without remedy and beyond the scope of judicial review. And, contrary to the

Comptroller's position herein,⁶² such denial and his proposed unlawful act would clearly deprive respondents of their property and statutory rights without due process of law.⁶³

B. The District Court Clearly Had Jurisdiction to Entertain This Action and Affirmance of the Court of Appeals on its Standing to Sue Holding is Absolutely Essential.

When the District Court found that respondent banks had standing to sue, there could no longer be any question regarding the Court's jurisdiction or the right of respondent banks to judicial review under the Administrative Procedure Act (5 U.S.C. § 1001, 1009). *Wisconsin Bankers Association v. Robertson*, 190 F. Supp. 90, 94; aff'd. 294 F.2d 714, *cert denied* 368 U.S. 938, rehearing denied 368 U.S. 979 (1961). As stated by this Court in *Stark v. Wickard, supra*, such suits fall within "the general jurisdiction of the federal courts under Article III of the Constitution." It is equally clear, however, that jurisdiction was also properly grounded on 28 U.S.C. § 1331, which gives the district courts original jurisdiction of all civil actions arising under the Constitution and laws of the United States. Finally, respondents' right to judicial review of the Comptroller's proposed unlawful action is likewise guaranteed by the language of the Administrative Procedure Act itself, which provides:

"(a) Any person suffering legal wrong because of an agency action, or adversely affected or aggrieved by such action within the meaning of

⁶² At page 37 of his brief.

⁶³ As stated in the Comptroller's brief, a district court in North Carolina recently ruled that the Comptroller's entire secret, non-hearing process unconstitutionally denies due process of law (*First National Bank of Springfield v. Saxon*, U.S.D.C.E.D.N.C.).

any relevant statute, shall be entitled to judicial review thereof.

“(b) The form of proceeding for judicial review shall be . . . any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory injunction . . .) in any court of competent jurisdiction.

“(c) Every . . . final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. . . .”

Respondent banks submit that they would, as stated above, clearly suffer a legal wrong if the Comptroller were permitted unlawfully to license the opening and operation of Whitney in Jefferson Parish; that they would be adversely affected or aggrieved by such action within the meaning of Section 36(c) of the National Bank Act and under the Louisiana Bank Holding Company Act, as authorized by 12 U.S.C. 1846; and that the action filed in the District Court, being a suit for declaratory judgment and prohibitory injunction, was correct in form.

Finally, these respondents assert that there is no other “*adequate remedy in any court*” to prevent or rectify the Comptroller’s proposed final action. The Comptroller admits, at page 38 of his brief, that there is “no provision for an administrative hearing and no authorization for competitors to appear before the Comptroller” to contest his actions—“his decisions are made *ex parte*. . . .”⁶⁴ The Comptroller himself goes further to demonstrate the urgent necessity for respondents’ suit here by stating, again at page 38 of his brief: “There are, moreover, no statutory provi-

⁶⁴ Comptroller’s brief, p. 38.

sions for judicial review (in the National Bank Act); *indeed there is no administrative record of the evidence and arguments upon which the Comptroller bases his action.*" What an excellent opportunity for the creation and maintenance of a diabolic autocracy, without any due process of law, if this Court should rule, as the Comptroller contends, again at page 38 of his brief, that there should be no "forum where competitors could protect an alleged right to be free of *unauthorized competition.*"

The Comptroller, of course, completely misses the point upon which this action is based. He states, at page 39 of his brief: "Unless those engaged in a business have a *statutory right* to be free of competition, they have no standing to challenge an administrative action. . . ." But, respondent banks do have a "*statutory right*" to be free of *Whitney's unlawful competition!* That *statutory right* is twofold: First, under the provisions of Section 36(c) of the National Bank Act; and secondly, under the Louisiana Bank Holding Company Act, as authorized by 12 U.S.C. 1846.

If this Court can possibly convince the Comptroller that his *ex parte* realm is not impregnable, a new era of statutory responsibility might soon dawn, wherein the Comptroller will at least hesitate before he helps devise, abet and seek to ram through illegal programs aimed at destroying the prohibitions of the very Act he is charged to uphold. This Court will certainly remember the boldness of the Comptroller in the recent *Philadelphia National* and *Lexington, Kentucky* bank merger cases,⁶⁵ where the Comptroller, over the

⁶⁵ *United States v. Philadelphia Nat. Bk.*, 374 U.S. 321; *United States v. First Nat. Bank of Lexington*, 84 S. Ct. 1033.

unanimous opposition of all other Government agencies involved, sought nevertheless to license the mergers later struck down by landmark decisions of this tribunal. This Court is probably also aware of the Comptroller's tenacity when, as a federal official, he sought recently, in two other district court cases, to intervene, *as a party adverse to the Government*, when the Department of Justice sought to prevent the culmination of other bank mergers approved by him.⁶⁶ His latter actions were so bizarre that the Justice Department felt constrained to apologize to the District Court in its written memorandum of opposition to his intervention:⁶⁷

"We note that while the paper which Mr. Saxon has sought to file indicates he wishes to appear '*pro se*,' this must manifestly be a reference to the fact that he appears without counsel, and does not mean that he deems himself to be personally interested in the litigation. . . . It is (a) basic and unfortunate misapprehension which accounts for the Comptroller's effort *to align himself as a party defendant in a suit brought by the United States to enforce an Act of Congress*. We apologize to the Court for the action of an officer of the executive branch seeking to intervene in this action without counsel and without legal authority." (Italics supplied).

The absolute importance of a decision by this Court affirming the Court of Appeals on the standing to sue

⁶⁶ *United States v. Crocker-Citizens National Bank*, U.S.D.C.N.D. Cal. 3/23/64; *United States v. Third Nat. Bk. of Nashville, D.C. Tenn.* 9/29/64. Both Courts denied his motions to intervene on the dates just stated.

⁶⁷ Filed by the Government in *United States v. Third Nat. Bk. of Nashville*, *supra*.

and jurisdictional aspects of this case also lies in the fact that once the Comptroller is permitted to license an illegal operation, *respondent banks would have no remedy whatsoever*. A good analysis of this vital problem is contained in Judge Youngdahl's decision in *Commercial State Bank of Roseville v. Gidney, supra*. Judge Youngdahl there concluded that, once the Comptroller issues his certificate, "the facts upon which (he) bases his decision cannot be questioned by anyone except the United States" (174 F. Supp. 770, 778). He went on to state, at page 779:

"While plaintiffs . . . might succeed in persuading the United States Attorney General to institute quo warranto proceedings . . . , the remedy is hardly an 'adequate' one; it is speculative at best and in the Court's opinion not sufficient to prevent the issuance of a preliminary injunction. Cf. *Columbian Cat Fanciers v. Koehne*, 1938, 68 App. App. D. C. 257, 96 F.2d 529, 532, in which it was held that the remedy of quo warranto is not an 'adequate remedy at law,' so as to preclude equitable relief, where the party interested must appeal to the discretion of some other person or body to maintain quo warranto."

In the case at bar, the Department of Justice and its attorneys have consistently acted as counsel for the Comptroller. There remains no hope that they might suddenly reverse themselves and advise the Attorney General to attack that which his department has been defending. Hence, respondents' sole remedy is in the suit here involved. If it is taken from them, the illegal operation will be licensed, the vast irreparable damage will be done, and equity, contrary to its most fundamental principle, will have suffered a wrong to be without a remedy.⁶⁸

⁶⁸ See 30 C.J.S., § 105, p. 506.

C. This Suit to Enjoin the Comptroller From Licensing the Opening of an Unlawful Banking Operation Under the National Bank Act in No Respect Represents a Collateral Attack Upon a Decision of the Federal Reserve Board Made Under a Different Statute, and in a Case Involving Entirely Different Matters and Different Parties.

Petitioners both admit in their briefs that "Approval of two federal agencies was necessary before the Whitney program could be put into effect."⁶⁹ As stated by the Comptroller, at page 6:

"The program . . . required (a) the approval of the Comptroller of the Currency (*under the National Bank Act*) for the chartering of the (Jefferson) bank and (b) the permission of the Board of Governors of the Federal Reserve System (*under the Bank Holding Company Act*) for the holding company's acquisition . . . of the (shares) of the . . . bank in Jefferson Parish."

The Comptroller also patently recognizes, at pages 19, 20 of his brief, that *two completely separate and different statutory proceedings* had to be followed—(a) the first, *by the holding company alone* (Whitney Holding), to obtain the Board's approval, under the Holding Company Act (12 U.S.C. 1842), of the proposed stock acquisitions *only*, and (b) the second, *by the national banking association alone* (Whitney Jefferson), to obtain a Certificate of Authority from the Comptroller of the Currency, under the National Bank Act (12 U.S.C. 24-27), authorizing the association to commence the business of banking.

The two statutory proceedings, one under the National Bank Act and the other under the Federal Bank Holding Company Act, are completely independent of each other as a matter of law. The National

⁶⁹ Comptroller's brief, pp. 6, 19, 20; Whitney brief, p. 7.

Bank Act proceeding is administered exclusively by the Comptroller of the Currency. The Board plays *no* statutory part in these proceedings and it possesses no jurisdiction to license or refuse to license the opening of a national bank or a branch thereof (See 12 U.S.C. 21-27). That administrative function is the Comptroller's alone (12 U.S.C. 27).

The Federal Bank Holding Company Act proceeding, on the other hand, is under the jurisdiction of the Board (12 U.S.C. 1842(a), (b)). The Board *alone* has the authority to grant or deny an application by a holding company for the right to acquire the shares of any bank (12 U.S.C. 1842(b)).

As stated above, the proceeding before the Comptroller under the National Bank Act is commenced and prosecuted exclusively by the proposed national banking association (12 U.S.C. § 21-27). The Holding Company Act proceeding on the other hand, is commenced and prosecuted by the proposed holding company (12 U.S.C. 1842). Thus, in the case at bar, Whitney Jefferson's application to commence banking was filed with the Comptroller (R. 380, 381), while Whitney Holding's separate application for permission to become a bank holding company and to acquire bank shares was filed with and prosecuted before the Board (*Comp. Ex. 4, R. 52, et seq.*). Hence, the two administrative proceedings involved

- (1) completely different matters and objects,
- (2) completely different applicants and applications, and
- (3) entirely different and separate determinations—i.e., (a) the licensing of the proposed banking opera-

tion by the Comptroller, and (b) a permit (issued by the Board) to the Holding Company to acquire shares in the two banks.

Congress, of course, has also prescribed completely different and separate administrative proceedings to be pursued under the two statutes. Under the Holding Company Act (12 U.S.C. 1842), after the holding company application is received by the Board, the Board obtains "views and recommendations" of the Comptroller and/or the State supervisory authority, as the case may be. *Only if such state or federal authority disapproves the application must the Board schedule the matter for a hearing (12 U.S.C. 1842(b)).* If the Comptroller, for example, approves, *no hearing need be held (12 U.S.C. 1842).* *Indeed, in the case at bar, no such hearing was ever held because the Comptroller did approve.* The Board merely scheduled an informal conference proceeding at its headquarters in Washington (as distinguished from a regular hearing in Louisiana) to receive "*oral views and comments*" (R.62). The Board then rendered its decision, *limited to the following (R.97): (i) Whitney Holding was permitted to become a holding company, and (ii) Whitney Holding was authorized to proceed to acquire the stock of the two Whitney subsidiaries.* That decision alone was subject to judicial review under 12 U.S.C. 1848; and the *review provided by that Section in no respect authorized any relief, injunctive or otherwise, against the Comptroller.*

As stated by the Comptroller, at pages 19, 20 of his brief, Congress has prescribed an entirely different administrative course to be followed under the National Bank Act. This procedure, in his own words, is as follows:

"The National Bank Act, however, makes no provision for an administrative hearing or for judicial review, and the Comptroller's decisions are made informally, without an administrative record."

But, as stated hereinabove, Congress and the Courts have provided that the Comptroller has no authority to license the opening of a banking operation which is not "*lawfully entitled to commence*" (12 U.S.C. 27; *Camden Trust Co. v. Gidney, supra*; *Commercial State Bank v. Gidney, supra*; *Union Savings Bank of Patchogue v. Saxon, supra*).

Hence, it should be clear to all—principally the Comptroller—that the sole purpose of this action is to enjoin him from licensing, under the National Bank Act, an illegal banking operation, which is not lawfully entitled to commence. This suit seeks no relief, directly, indirectly or collaterally against the Federal Reserve Board. That Board and Whitney Holding Corporation are not even parties to this action. Neither has ever sought to intervene or to be represented at any of the proceedings herein. Nor, will the injunctive relief granted by the Courts below operate to stay or enjoin the Federal Reserve Board in any respect, and it does not apply to reverse, set aside, or modify any order or opinion of that Board. *Those matters, those parties (the Board and Whitney Holding) and the legality of the stock acquisitions* there involved are exclusively before the Fifth Circuit Court of Appeals in *Bank of New Orleans and Trust Company, et ano. v. Federal Reserve Board, and Whitney Holding Corporation, supra*.

But, just as this case in no respect involves the questions or parties at issue in the Fifth Circuit case—

the Fifth Circuit case under 12 U.S.C. 1848 likewise in no manner involves the Comptroller of the Currency as a party; or Whitney Jefferson as a party; or the question of whether the Comptroller should be enjoined from licensing Whitney Jefferson under the National Bank Act. That case is limited to a review of the "stock acquisition" question *only*, and the outcome there will be binding on the Board and Whitney Holding—but not on the Comptroller and Whitney Jefferson.

If this fact were not otherwise clear, the Comptroller made it irrefutable in a sworn affidavit herein. (R. 310). He advised the District Court under oath, on August 9, 1962 (R. 310):

"4. I am advised that review of the Board's Order of May 3, 1962, is presently being sought before the United States Court of Appeals for the Fifth Circuit. . . .

"5. On July 10, 1962, the Governor of the State of Louisiana approved Act 275, entitled 'An Act to define the bank holding company, to prohibit the formation of new bank holding companies, and to control the future expansion of existing bank holding companies and of their subsidiaries.'

"6. Upon consideration of these subsequent developments, . . . *I have concluded that there has occurred no reason to alter the Comptroller's prior determination that a certificate of authority should be issued to Whitney National Bank in Jefferson Parish, pursuant to 12 U.S.C. § 27*

"7. *Accordingly, if the preliminary injunction entered herein is vacated, and if Whitney National Bank in Jefferson Parish so requests; . . . it is my present intention to issue such certificate.*" (Italics supplied).

In the light of this open, sworn threat, it is impossible to fathom how the Comptroller can urge so speciously in his brief that respondents have a full and adequate remedy in the proceedings now in the Fifth Circuit; or that this suit somehow is intended solely as a collateral attack on the decision of the Federal Reserve Board. Obviously, respondents have no full and adequate remedy in those proceedings. *If the injunction in this case is lifted, the Comptroller intends forthwith to license the opening of the unlawful banking operation, in violation of the National Bank Act. Respondents cannot enjoin the Comptroller from doing this in the Fifth Circuit case for all the reasons given. Ergo., this suit is respondents' sole means of effective relief, and it must be sustained by this Court (Columbia Broadcasting System, Inc. v. United States, 316 U.S. 407, 423, where this Court sustained a suit for injunctive relief in circumstances where other administrative remedies were either inapplicable or entirely insufficient).*

At page 28 of the Comptroller's brief, he states: "If the Comptroller is bound by the decision of the Federal Reserve Board . . . he cannot be enjoined to disregard the Board's decision." But, the decision of the Board *does not* direct the Comptroller to do anything under the National Bank Act. The Board does not direct or instruct the Comptroller to issue his Certificate of Authority. Its decision is limited to the holding company's stock acquisition alone, and it leaves the Comptroller free, under the National Bank Act, to determine for himself whether the proposed bank is *lawfully entitled to commence banking* (12 U.S.C. 27).

Under these circumstances, we submit that the cases relied on by the Comptroller, at pages 29-32 of his brief,

are not applicable here. First, all of those cases involved situations where Congress had provided adequate administrative proceedings *before the Government agency directly involved in the suits sought to be commenced, and such proceedings were either ignored or pending incomplete before that agency.* Here, the Comptroller admits, at page 38 of his brief:

“There is . . . no provision for an administrative hearing and no authorization for competitors to appear before the Comptroller; his decisions are made *ex parte* after his own informal investigation In deed there is no administrative record of the evidence and arguments upon which the Comptroller bases his action.”

Thus, wholly unlike the situations in *Far East Conference v. United States*, 342 U.S. 570; *Myers v. Bethlehem Corp.*, 303 U.S. 41; *Callanan Road Co. v. United States*, 345 U.S. 507; *FPC v. Colorado Interstate Gas Co.*, 348 U.S. 492; *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320; *Seattle v. Beezer*, 376 U.S. 224; and other similar cases relied on by the Comptroller—there were no administrative proceedings before the Comptroller in this case for respondents to exhaust or for respondents collaterally to attack.

A fortiori, respondents' sole effective remedy against the licensing of Whitney Jefferson is in the action before this Court. No such relief is available in the Fifth Circuit, where neither the Comptroller nor Whitney Jefferson are parties and where the Comptroller's right unlawfully to license the opening of the illegal banking operation under the National Bank Act is not directly in issue.

D. There Is Absolutely No Merit to the Comptroller's Contention That Congress Required the Issues Here Raised To Be Presented to and Settled By the Federal Reserve Board.

At page 20 of his brief, the Comptroller urges this Court to hold that all of the issues presented by this case under the National Bank Act should have been presented to and settled by the Federal Reserve Board. The short answer to that contention is (1) the Comptroller has pointed to no law so providing; (2) *the Federal Reserve Board, in the case at bar, specifically ruled that it will not pass on any "alleged violation of provisions of the National Bank Act, which is administered by the Comptroller of the Currency, an official of the United States Treasury Department"* (R. 168); and (3) no statutory hearing, such as that contemplated by 12 U.S.C. 1842(b), was ever held by the Board in Louisiana—the necessity for such hearing having been negated by the Comptroller's own approval of the program as aforesaid.⁷⁰

In essence, therefore, as stated by the Board itself, it has no jurisdiction over the licensing of banks under the National Bank Act, and it has no obligation, under 12 U.S.C. 27 to determine whether an organization such as Whitney Jefferson (which has never even been before it) is lawfully entitled to commence business.

In this regard, two of the attorneys for the Comptroller in this case,⁷¹ who have also simultaneously acted for the Board in the Fifth Circuit proceedings,

⁷⁰ As stated before, the sole proceeding before the Board, to which respondents were not invited or subpoenaed, was an informal acceptance of views.

⁷¹ Messrs. Hollander and Rose.

stated in a brief filed by them in the latter proceedings in May, 1963,—at page 57 of that brief:

“From the foregoing legislative history, it seems to us clear that Congress intended that the Board pass upon applications for the acquisition or establishments (sic) of subsidiaries *without regard to State prohibitions against branch banking*. The language of the Act clearly reveals this intent.” (Italics supplied).

And, at page 71:

“None of the issues before this Court have been decided by the District Court for the District of Columbia *and the only issue resolved by that court is not before this Court*.” (Italics supplied).

In fact, the Board, like the Comptroller here, has repeatedly urged the Fifth Circuit to dismiss the proceedings there “for lack of jurisdiction.”

In essence, therefore, the Government has told the Fifth Circuit that respondents’ remedy is against the Comptroller, while here we are told that respondents’ sole remedy rests in the Fifth Circuit proceedings against the Board. This, we submit, is hardly a suitable position to advance before a court of equity.

Finally, we suggest most strenuously that, in any event, the contention that respondents allegedly failed to exhaust their administrative remedies *before the Board* under the Bank Holding Act belongs *exclusively to the Board and it cannot be appropriated by petitioner Saxon in this case*. Indeed, his assertion of that contention here is itself a collateral attack upon the jurisdiction of the Fifth Circuit in a completely separate case, pending between different parties and involving entirely different matters.

CONCLUSION

The decisions of both the Court of Appeals and the District Court should be affirmed by the Supreme Court of the United States.

Respectfully submitted,

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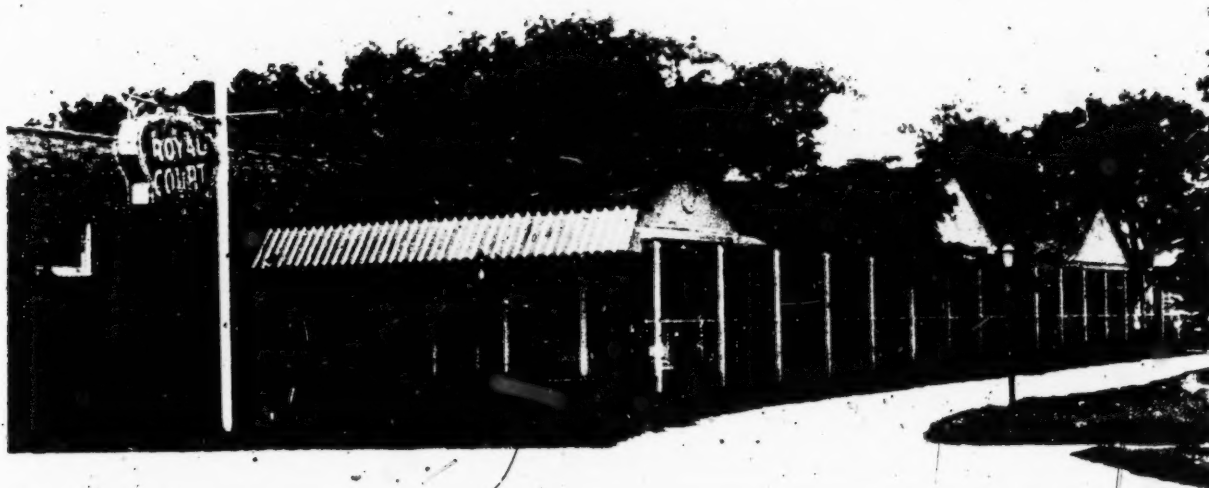
JAMES W. BEAN,

G. HARRISON SCOTT,

Of Counsel.



"Alleged Temporary Location" of Whitney National Bank in Jefferson Parish, as photographed on July 3, 1962, 24 days after this action was commenced.



"Alleged Permanent Location" of Whitney National Bank in Jefferson Parish, as photographed on July 3, 1962, 24 days after this action was commenced.

APPENDIX B

ORIGINAL

WHITNEY NATIONAL BANK

IN JEFFERSON PARISH
JEFFERSON PARISH, LA

NUMBER

Pay to the order of

Dollars

AUTHORIZED SIGNATURE

19

NO

WHITNEY NATIONAL BANK

IN JEFFERSON PARISH
JEFFERSON PARISH, LA

65 317
350

PAY TO
THE ORDER OF

\$

DOLLARS

SPECIMENS OF PROPOSED CHECKS TO BE USED BY WHITNEY
NATIONAL BANK IN JEFFERSON PARISH

WHITNEY NATIONAL BANK

IN JEFFERSON PARISH

JEFFERSON PARISH, LA.

JAMES GILLY, JR.

PRESIDENT

SPECIMEN OF LETTERHEAD TO BE USED BY WHITNEY NATIONAL
BANK IN JEFFERSON PARISH